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TIER CODE

CIVIL PROCEDURE

THE CODE

OF

CIVIL PROCEDURE.

THE CODE

OF

CIVIL PROCEDURE.

[Calif. laws, statutes, etc.]

THE
CODE
OF
CIVIL PROCEDURE
OF THE

STATE OF CALIFORNIA,

ADOPTED MARCH 11, 1872, AND AMENDED UP TO
AND INCLUDING 1905.

WITH
STATUTORY HISTORY AND CITATION DIGEST UP TO AND
INCLUDING VOLUME 147 OF CALIFORNIA
REPORTS.

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CODE OF CIVIL PROCEDURE.

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§ 234	§ 1635	§ 281	§ 1436
§ 235	§ 1636	§ 282	§ 1411
§ 236	§ 1636	§ 283	§ 1437
§ 237	§ 1637	§ 284	§ 1438
§ 238	§ 1638	§ 285	§ 1439
§ 239	§ 1643	§ 286	§ 1440
§ 240	§ 1644	§ 287	§ 1704-5
§ 241	§ 1645	§ 288	§ 1710
§ 242	§ 1646	§ 289	§ 1709
§ 243	§ 1647	§ 290	§ 1711
§ 244	§ 1648	§ 291	§ 2093
§ 245	§ 1649	§ 293	§ 1713
§ 246	§ 1650	§ 294	§ 1616-17
§ 247	§ 1651	§ 295	§ 1718
§ 248	§ 1652	§ 296	§ 1719
§ 249	§ 1653	§ 297	
§ 250	§ 1658	§ 298	
§ 251	§ 1659	§ 299	
§ 252	§ 1660	§ 300	See §§
§ 253	§ 1661	§ 301	969-971
§ 254	§ 1661	§ 302	§ 1720
§ 255	§ 1661	§ 302	§ 1738
§ 256	§ 1661	§ 302	§ 1739
§ 257	§ 1662	§ 304	§ 1728
§ 258	§ 1665	§ 305	§ 1729
§ 259	§ 1666-67	§ 305	§ 1741-42
§ 260	§ 1668-69	§ 306	§ 1730
§ 261	§ 1675	§ 307	§ 1731
§ 262	§ 1677	§ 308	§ 1732
§ 263	§ 1676	§ 309	§ 1733
§ 264	§ 1678	§ 310	§ 1734
§ 265	§ 1679	§ 311	§ 1735
§ 266	§ 1680	§ 312	§ 1736
§ 267	§ 1681	§ 315	
§ 268	§ 1682	§ 316	
§ 270	§ 1683	§ 317	
§ 271	§ 1684	§ 318	
§ 272	§ 1685	§ 319	See Civil Code
§ 273	§ 1686	§ 320	§§ 1385-1399
§ 274	§ 1691	§ 321	
§ 275	§ 1692	§ 322	

Probate Act.	Code C. P.	Probate Act.	Code C. P.
§ 323		§ 361	§ 1783
§ 324		§ 362	§ 1784
§ 325		§ 363	§ 1785
§ 326		§ 364	§ 1786
§ 328	§ 1269	§ 365	§ 1787
§ 329	§ 1271	§ 366	§ 1788
§ 331	§ 1272	§ 367	§ 1789
§ 336	§ 1747	§ 368	§ 1790
§ 337	§ 1748	§ 369	§ 1806
§ 338	§ 1749	§ 370	§ 1774
§ 339	§ 1750	§ 371	§ 1792
§ 340	§ 1751	§ 372	§ 1801
§ 341	§ 1752	§ 373	§ 1802
§ 342	§ 1753-54	§ 374	§ 1803
§ 343	§ 1754	§ 375	§ 1804
§ 344	§ 1757	§ 376	§ 1805
§ 345	§ 1758	§ 377	§ 1800
§ 346	§ 1759	§ 378	§ 1793
§ 347	§ 1763	§ 379	§ 1794
§ 348	§ 1764	§ 380	§ 1795
§ 349	§ 1765	§ 381	§ 1796
§ 350	§ 1768	§ 382	§ 1776
§ 351	§ 1769	§ 383	§ 1807
§ 352	§ 1770	§ 384	§ 1775
§ 353	§ 1772	§ 385	§ 1791
§ 354	§ 1773	§ 386	§ 1797
§ 355	§ 1777	§ 387	§ 1798
§ 356	§ 1778	§ 388	§ 1799
§ 357	§ 1779	§ 389	
§ 358	§ 1780	§ 390	Civil Code
§ 359	§ 1781	§ 391	Sections
§ 360	§ 1782	§ 392	264-267

PRACTICE ACT.

Table of sections of which there is no corresponding section in the Code of Civil Procedure.

SECTION	ENACTED.	AMENDED.	REPEALED.	CAL. REP. CITATION.
211	Apr. 29, 1851	1863:689	By Code.	
357	Apr. 29, 1851	1854: 65	By Code.	
363	Apr. 29, 1851		By Code.	
364	Apr. 29, 1851		By Code.	
365	Apr. 29, 1851	1854: 66	By Code.	
366	Apr. 29, 1851	1853:277		39- 99
		1854: 66		
		1854: 73	By Code.	
393	Apr. 29, 1851	1854: 66		4- 16
		1863:701		7- 96
		1869-70:662	By Code.	7-256
				9- 70
				16-556
				17-604
				25-189
				26- 35
				36-512
				43-529
				122-857
417	Apr. 29, 1851	1863:701	By Code.	17-604
418	Apr. 29, 1851	1863:702	By Code.	17-604
				26- 35
419	Apr. 29, 1851		By Code.	
420	Apr. 29, 1851	1863:701	By Code.	28-300
				35- 97
421	Apr. 29, 1851		1863:702	9- 70
				26- 35
422	Apr. 29, 1851	1861:521	1863:702	22-115
				22-235
				22-236
				22-660
				26-147
				26-148
423	Apr. 29, 1851	1854: 67	1863:702	3-302
490	Apr. 29, 1851		By Code.	
501	Apr. 29, 1851	1853:278	1855:250	
502	Apr. 29, 1851	1853:278	1855:250	
503	Apr. 29, 1851		1855:250	
509	Apr. 29, 1851	1859:224		
		1862: 88		
		1863:498	By Code.	
533	Apr. 29, 1851	1860:304	By Code.	
537	Apr. 29, 1851	1866:708	By Code.	
543	Apr. 29, 1851	1854: 67	By Code.	34-645
				34-646
549	Apr. 29, 1851		By Code.	
575	Apr. 29, 1851		By Code.	
615	Apr. 29, 1851		By Code.	
620	Apr. 29, 1851	1853:281	1854: 71	

SECTION.	ENACTED.	AMENDED.	REPEALED.	CAL. REP. CITATION.
632	Apr. 29, 1851	1854: 71		
642	Apr. 29, 1851	1855:199	1855:250	
644	Apr. 29, 1851		By Code.	
648	Apr. 29, 1851		By Code.	
649	Apr. 29, 1851		By Code.	

PROBATE ACT.

Table of sections of which there is no corresponding section in the Code of Civil Procedure.

SECTION.	ENACTED.	AMENDED.	REPEALED.	CAL. REP. CITATION.
1	Apr. 22, 1850	1864:367	1851:489	20-153
	1851:448			
26	Apr. 22, 1850		1851:489	
	1851:448			
124	Apr. 22, 1850		1851:489	29-372
	1851:448			35-313
				35-315
				35-316
				35-323
				43-643
269	Apr. 22, 1850	1861:650	1851:489	
	1851:448			
291	Apr. 22, 1850		1851:489	
	1851:448			
292	Apr. 22, 1850	1861:653	1851:489	
	1851:448			
295	Apr. 22, 1850	1855:300	1851:489	26-280
	1851:448	1861:654		49-471
303	Apr. 22, 1850		1851:489	
	1851:448			
313	Apr. 22, 1850		1851:489	
314	Apr. 22, 1850	1855: 33	1851:489	
			1861:655	
315	Apr. 22, 1850		1851:489	
316	Apr. 22, 1850		1851:489	
317	Apr. 22, 1850		1851:489	

PRACTICE ACT.

NOTE.—Section numbers from 649 on are numbers given by the Editor of Practice Act in 1854, and cover new sections added and supplemental sections.

PROBATE ACT.

NOTE.—Section numbers from 318 on are numbers given by the Editor of Probate Act in 1858, and cover new sections added and supplemental sections.

AN ACT TO ESTABLISH A CODE OF CIVIL PROCEDURE.

The People of the State of California, represented in Senate
and Assembly, do enact as follows:

TITLE OF ACT.

§ 1. Title and division of this volume.

§ 1. Title and division of this volume. This act shall
be known as The Code of Civil Procedure of California,
and is divided into four parts, as follows:

Part I. Of Courts of Justice.

II. Of Civil Actions.

III. Of Special Proceedings of a Civil Nature.

IV. Of Evidence. En. Mar. 11, 1872.

This act, how cited: Sec. 19, post.

Construction of the codes and of their various sections:
See Pol. Code, secs. 4478 et seq.

THE
CODE OF CIVIL PROCEDURE
OF CALIFORNIA.

PRELIMINARY PROVISIONS.

2. When this code takes effect.
3. Not retroactive.
4. Rule of construction of this code.
5. Provisions similar to existing laws, how construed.
6. Tenure of offices preserved.
7. Construction of repeal as to certain officers.
8. Actions, etc., not affected by this code.
9. Limitations shall continue to run.
10. Holidays.
11. Same.
12. Computation of time.
13. Certain acts not to be done on holidays.
14. "Seal" defined.
15. Joint authority.
16. Words and phrases.
17. Certain terms used in this code defined.
18. Statutes, etc., inconsistent with code repealed.
19. This act, how cited, enumerated, etc.
20. Judicial remedies defined.
21. Division of judicial remedies.
22. Action defined.
23. Special proceeding defined.
24. Division of actions.
25. Civil actions arise out of obligations or injuries.
26. Obligation defined.
27. Division of injuries.
28. Injuries to property.
29. Injuries to the person.
30. Civil action, by whom prosecuted.
31. Criminal actions.
32. Civil and criminal remedies not merged.

§ 2. When this code takes effect. This code takes effect at twelve o'clock noon, on the first day of January, eighteen hundred and seventy-three. En. March 11, 1872.

Effect of codes generally: See Pol. Code, secs. 4478 et seq.

§ 3. Not retroactive. No part of it is retroactive, unless expressly so declared. En. March 11, 1872.

Cal. Rep. Cit. 56, 299; 59, 289; 63, 264; 85, 84; 95, 201; 106, 680; 117, 149.

Effect on pending proceedings and vested rights: See sec. 8, post.

Effect of code on existing statutes: See sec. 18, post.

§ 4. Rule of construction of this code. The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this code. The code establishes the law of this state respecting the subjects to which it relates, and its provisions and all proceedings under it are to be liberally construed, with a view to effect its objects and to promote justice. En. March 11, 1872.

Cal. Rep. Cit. 61, 216; 64, 7; 64, 241; 64, 430; 65, 98; 65, 303; 66, 289; 66, 310; 72, 80; 74, 76; 80, 256; 81, 419; 83, 370; 83, 464; 87, 294; 90, 506; 91, 353; 92, 201; 93, 390; 93, 423; 94, 43; 99, 625; 102, 541; 104, 492; 105, 558; 116, 381; 118, 383; 129, 311; 139, 382; 140, 9; 142, 195; 144, 611.

Construction of codes with relation to each other, and reconciling conflicts between titles, chapters, and articles: See Pol. Codes, secs. 4480 et seq.

Rules for construction of statutes: See post, secs. 1858, 1859, 1866.

§ 5. Provisions similar to existing laws, how construed. The provisions of this code, so far as they are substantially the same as existing statutes, must be construed as continuations thereof, and not as new enactments. En. March 11, 1872.

Cal. Rep. Cit. 50, 613; 64, 241.

Effect of codes on existing statutes: See post, sec. 18.

§ 6. Tenure of offices preserved. All persons who at the time this code takes effect hold office under any of the acts repealed continue to hold the same according to the tenure thereof, except those offices which are not continued by one of the codes adopted at this session of the legislature. En. March 11, 1872.

See next section.

§ 7. Construction of repeal as to certain officers. When any office is abolished by the repeal of any act, and such act is not in substance re-enacted or continued in either of the codes, such office ceases at the time the codes take effect. En. March 11, 1872.

Repeals by implication: See sec. 18, post.

§ 8. Actions, etc., not affected by this code. No action or proceeding commenced before this code takes effect, and no right accrued, is affected by its provisions, but the proceedings therein must conform to the requirements of this code as far as applicable. En. March 11, 1872.

Cal. Rep. Cit. 47, 59; 95, 202.

Similar provision in Civil Code, sec. 6; see also repealing clause at the end of this code.

§ 9. Limitations shall continue to run. When a limitation or period of time prescribed in any existing statute for acquiring a right or barring a remedy, or for any other purpose, has begun to run before this code goes into effect, and the same or any limitation is prescribed in this code, the time which has already run shall be deemed part of the time prescribed as such limitation by this code. En. March 11, 1872. Am'd. 1873-4, 279.

Cal. Rep. Cit. 50 613, 63, 265.

Existing actions not affected: See post, sec. 361.

Limitation of actions: See post, secs. 312 et seq.

§ 10. Holidays. Holidays within the meaning of this code are every Sunday, the first day of January, the twenty-second day of February, the thirtieth day of May, the fourth day of July, the ninth day of September, the first Monday in September, the twenty-fifth day of December, every day on which an election is held throughout the state, and every day appointed by the President of the United States, or by the governor of this state, for a public fast, thanksgiving, or holiday. If the first day of January, the twenty-second day of February, the thirtieth day of May, the fourth day of July, the ninth day of September, or the twenty-fifth day of December fall

upon a Sunday, the Monday following is a holiday. En. March 11, 1872. Am'd. 1880, 59; 1889, 46; 1893, 186; 1897, 15.

Cal. Rep. Cit. 65, 621; 71, 465.

Nonjudicial days: See post, sec. 134.

Last day falling on holiday: See post, sec. 13.

§ 11. Same. If the first day of January, the twenty-second day of February, the fourth day of July, or the twenty-fifth day of December, falls upon a Sunday, the Monday following is a holiday. En. March 11, 1872. Am'd. 1873-4, 280.

Cal. Rep. Cit. 63, 347; 145, 677.

Last day falling on holiday: See post, sec. 13.

§ 12. Computation of time. The time in which any act provided by law is to be done is computed by excluding the first day and including the last, unless the last day is a holiday, and then it is also excluded. En. March 11, 1872.

Cal. Rep. Cit. 51, 516; 61, 332; 61, 506; 63, 347; 63, 420; 63, 421; 71, 465; 77, 312; 82, 217; 86, 126; 104, 522; 105, 182; 112, 610; 122, 401; 124, 95; 131, 594; 131, 585; 132, 593; 136, 4; 136, 5.

Time, how computed, and year, week, and day defined: Pol. Code, secs. 3255 et seq.

§ 13. Certain acts not to be done on holidays. Whenever any act of a secular nature, other than a work of necessity or mercy, is appointed by law or contract to be performed upon a particular day, which day falls upon a holiday, such act may be performed upon the next business day, with the same effect as if it had been performed upon the day appointed. En. March 11, 1872.

Cal. Rep. Cit. 71, 465; 110, 551; 121, 100; 136, 193.

§ 14. "Seal" defined. When the seal of a court, public officer, or person, is required by law to be affixed to any paper, the word "seal" includes an impression of such seal upon the paper alone, as well as upon wax or a wafer affixed thereto. En. March 11, 1872.

Seals: See post, secs. 147-153, 1929-1934.

Distinction between sealed and unsealed instruments abolished by Civil Code, sec. 1629.

§ 15. Joint authority. Words giving a joint authority to three or more public officers or other persons are construed as giving such authority to a majority of them, unless it is otherwise expressed in the act giving the authority. En. March 11, 1872.

Cal. Rep. Cit. 63, 258.

§ 16. Words and phrases. Words and phrases are construed according to the context and the approved usage of the language; but technical words and phrases, and such others as have acquired a peculiar and appropriate meaning in law, or are defined in the succeeding section, are to be construed according to such peculiar and appropriate meaning or definition. En. March 11, 1872.

Cal. Rep. Cit. 92, 245; 130, 577; 131, 293; 146, 733.

§ 17. Certain terms used in this code defined. Words used in this code in the present tense include the future as well as the present; words used in the masculine gender include the feminine and neuter; the singular number includes the plural, and the plural the singular; the word "person" includes a corporation as well as a natural person; the word "county" includes "city and county"; writing includes printing and typewriting; oath includes affirmation or declaration; and every mode of oral statement, under oath or affirmation, is embraced by the term "testify," and every written one in the term "depose"; signature or subscription includes mark, when the person cannot write, his name being written near it by a person who writes his own name as a witness; provided, that when a signature is by mark it must, in order that the same may be acknowledged or may serve as the signature to any sworn statement, be witnessed by two persons who must subscribe their own names as witness thereto.

The following words have in this code the signification attached to them in this section, unless otherwise apparent from the context:

1. The word "property" includes both real and personal property;

2. The words "real property" are coextensive with lands, tenements and hereditaments;

3. The words "personal property" include money, goods, chattels, things in action, and evidences of debt;

4. The word "month" means a calendar month, unless otherwise expressed;

5. The word "will" includes codicil;

6. The word "writ" signifies an order or precept in writing, issued in the name of the people, or of a court or judicial officer; and the word "process" a writ or summons issued in the course of judicial proceedings;

7. The word "state," when applied to the different parts of the United States, includes the District of Columbia and the territories; and the words "United States" may include the district and territories;

8. The word "section" whenever hereinafter employed, refers to a section of this code, unless some other code or statute is expressly mentioned.

9. The word "affinity" when applied to the marriage relation, signifies the connection existing in consequence of marriage, between each of the married persons and the blood relatives of the other. En. March 11, 1872. Am'd. 1873-4, 280; 1903, 134.

Cal. Rep. Cit. 54, 178; 66, 289; 121, 586; 135, 574; 136, 674. Subd. 2—142, 539; 146, 122. Subd. 3—131, 39; 142, 539.

Prac. Act, sec. 647. En. April 29, 1851.

Notice defined: See Pol. Code, sec. 4175.

Process defined: See Pol. Code, sec. 4175.

Words used in boundaries are defined in sections 3903 to 3907 of the Political Code.

§ 18. Statutes, etc., inconsistent with code repealed. No statute, law, or rule is continued in force, because it is consistent with the provisions of this code on the same subject; but in all cases provided for by this code, all statutes, laws, and rules heretofore in force in this state, whether consistent or not with the provisions of this code, unless expressly continued in force by it, are repealed and abrogated. This repeal or abrogation does not revive any former law heretofore repealed, nor does it affect any right already existing or accrued, or any action or proceeding already taken, except as in this code provided; nor does it

affect any private statute not expressly repealed. En. March 11, 1872.

Cal. Rep. Cit. 47, 59; 49, 597; 55, 95; 63, 580; 64, 8; 64, 234; 64, 243; 64, 258; 65, 303; 73, 269; 80, 495; 93, 424.

Effect of code on prior statutes: See ante, sec. 8; also repealing clause at the end of this code.

Limitations, effect of code on: See ante, sec. 9.

Retroactive effect: See sec. 3, ante.

Statutes continued in force: See Pol. Code, secs. 18, 19.

Vested rights: See sec. 8, ante.

§ 19. This act, how cited, enumerated, etc. This act, whenever cited, enumerated, referred to, or amended, may be designated simply as the "Code of Civil Procedure," adding, when necessary, the number of the section. En. March 11, 1872.

§ 20. Judicial remedies defined. Judicial remedies are such as are administered by the courts of justice, or by judicial officers empowered for that purpose by the constitution and statutes of this state. En. March 11, 1872.

Cal. Rep. Cit. 71, 397; 135, 14.

§ 21. Division of judicial remedies. The remedies are divided into two classes:

1. Actions; and,

2. Special proceedings. En. March 11, 1872.

Cal. Rep. Cit. 118, 661; 118, 663; 135, 14.

§ 22. Action defined. An action is an ordinary proceeding in a court of justice, by which one party prosecutes another, for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense. En. March 11, 1872.

Cal. Rep. Cit. 72, 339; 73, 455; 88, 379; 89, 106; 99, 170; 117, 387; 118, 341; 118, 661; 118, 662; 118, 663; 135, 14; 138, 581.

§ 23. Special proceeding defined. Every other remedy is a special proceeding. En. March 11, 1872.

Cal. Rep. Cit. 88, 379; 89, 106; 92, 248; 117, 387; 118, 661; 118, 662; 118, 663; 127, 561; 135, 14; 141, 98.

Special proceedings: See secs. 52, 76, 1022, and part three of this code generally.

Special proceedings of a civil nature: See post, part three, secs. 1063 et seq.

§ 24. Division of actions. Actions are of two kinds:

1. Civil; and,
2. Criminal. En. March 11, 1872.

Civil action, form of: See sec. 307, post.

Criminal action: See sec. 31, post.

§ 25. Civil actions arise out of obligations or injuries.

A civil action arises out of:

1. An obligation;
2. An injury. En. March 11, 1872.

Cal. Rep. Cit. 49, 466; 99, 170; 118, 341; 139, 405.

§ 26. Obligation defined. An obligation is a legal duty, by which one person is bound to do or not to do a certain thing, and arises from:

1. Contract; or,
2. Operation of law. En. March 11, 1872. Am'd. 1873-4, 281.

Cal. Rep. Cit. 99, 170; 139, 405.

Obligation, what: See Civ. Code, secs. 1427, 1428.

§ 27. Division of injuries. An injury is of two kinds:

1. To the person; and,
2. To property. En. March 11, 1872.

§ 28. Injuries to property. An injury to property consists in depriving its owner of the benefit of it, which is done by taking, withholding, deteriorating or destroying it. En. March 11, 1872.

§ 29. Injuries to the person. Every other injury is an injury to the person. En. March 11, 1872.

§ 30. Civil action, by whom prosecuted. A civil action is prosecuted by one party against another for the en-

forcement or protection of a right, or the redress or prevention of a wrong. En. March 11, 1872.

Cal. Rep. Cit. 104, 13; 109, 655.

Forms of action: See post, sec. 307.

§ 31. Criminal actions. The Penal Code defines and provides for the prosecution of a criminal action. En. March 11, 1872.

Criminal action defined: See Pen. Code, sec. 683.

§ 32. Civil and criminal remedies not merged. When the violation of a right admits of both a civil and criminal remedy, the right to prosecute the one is not merged in the other. En. March 11, 1872.

PART I.

OF COURTS OF JUSTICE.

TITLE I.

ORGANIZATION AND JURISDICTION.

- Chapter I. Courts of Justice in General, §§ 33, 34.
- II. Court of Impeachment, §§ 36-39.
 - III. Supreme Court, §§ 40-57.
 - IV. Superior Courts, §§ 65-79.
 - V. Justices' Courts, §§ 85-115.
 - VI. Police Courts, § 121.
 - VII. General Provisions Respecting Courts of Justice, §§ 124-153.

[Part I, §§ 33-304, amended and in effect April 1, 1880.
Amendments 1880, 21 et seq.]

CHAPTER I.

COURTS OF JUSTICE IN GENERAL.

- § 33. The several courts of this state.
§ 34. Courts of record.

§ 33. The several courts of this state. The following are the courts of justice of this state:

1. The court of impeachments;
2. The supreme court;
3. The superior courts;
4. The justices' courts;
5. The police courts and such other inferior courts as the legislature may establish in any incorporated city or town, or city and county. En. March 11, 1872. Am'd. 1880, 21.

Judicial department. See Const. Cal., arts. 3, 6.

For subd. 5, see Const. Cal. art. 6, sec. 13.

Jurisdiction of the above courts is considered, post, in the various chapters treating thereof.

Court of impeachment: See post, secs. 36 et seq.

Supreme court: See post, secs. 40 et seq.

Superior courts: See post, secs. 65 et seq.

Justices' courts: See post, secs. 85 et seq.

Police courts: See post, sec. 121.

§ 34. **Courts of record.** The courts enumerated in the first three subdivisions of the last preceding section are courts of record. En. March 11, 1872. Am'd. 1880, 21.

Courts of record: See Const. Cal., art. 6, secs. 12.

§ 35. En. March 11, 1872. Rep. 1880, 21.

CHAPTER II.

COURT OF IMPEACHMENT.

§ 36. **Members of the court.**

37. **Jurisdiction.**

38. **Officers of the court.**

39. **Trial of impeachments provided for in the Penal Code.**

§ 36. **Members of the court.** The court of impeachment is the senate; when sitting as such court, the senators shall be upon oath; and at least two-thirds of the members elected shall be necessary to constitute a quorum. En. March 11, 1872. Am'd. 1880, 22.

Cal. Rep. Cit. 107, 118.

§ 37. **Jurisdiction.** The court has jurisdiction to try impeachments, when presented by the assembly, of the governor, lieutenant-governor, secretary of state, controller, treasurer, attorney-general, surveyor-general, chief justice of the supreme court, associate justices of the supreme court, and judges of the superior courts for any misdemeanor in office. En. March 11, 1872. Am'd. 1880, 22.

Jurisdiction: See Const. Cal., art. 4, sec. 18.

§ 38. **Officers of the court.** The officers of the senate are the officers of the court. En. Mar. 11, 1872. Am'd. 1880, 22.

§ 39. **Trial of Impeachments provided for in the Penal Code.** Proceedings on the trial of impeachments are provided for in the Penal Code. En. Stats. 1880, 22.

Proceedings for removal: See Pen. Code, secs. 737 et seq.

CHAPTER III.

SUPREME COURT.

40. Justices, elections, and terms of office.
41. Computation of years of office.
42. Vacancies.
43. Departments.
44. Apportionment of business.
45. Court in bank.
46. Absence or disability of chief justice.
47. Sessions.
48. Adjournments.
49. Decisions in writing.
50. Jurisdiction of two kinds.
51. Original jurisdiction.
52. Appellate jurisdiction.
53. Powers in appealed cases.
54. Concurrence necessary to transact business.
55. Transfer of books, papers, and actions.
56. Remittiturs in transferred cases.
57. Appeals in probate proceedings and contested election cases.

§ 40. Justices, elections, and terms of office. The supreme court shall consist of a chief justice and six associate justices, who shall be elected by the qualified electors of the state at large, at the general state elections next preceding the expiration of the terms of office of their predecessors respectively, and hold their offices for the term of twelve years from and after the first Monday after the first day of January next succeeding their election; provided, that of the justices elected at the general state election of eighteen hundred and seventy-nine, the chief justice shall go out of office at the end of eleven years and the six associate justices shall have so classified, or shall so classify themselves, by lot, that two of them shall go out of office at the end of three years, two of them at the end of seven years, and two of them at the end of eleven years, from the first Monday after the first day of January, eighteen hundred and eighty; and an entry of such classification shall have been or shall be made in the minutes of the court in bank, signed by them, and a duplicate thereof filed in the office of the secretary of state. En. March 11, 1872. Am'd. 1880, 22.

Supreme court: See Const. Cal., art. 6, secs. 2, 3.
Eligibility: See post, sec. 156.

Jurisdiction of supreme court: See post, secs. 50-53.

Acts relating to supreme court commission: See post, Appendix, Courts.

§ 41. **Computation of years of office.** The years during which a justice of the supreme court is to hold office are to be computed respectively from and including the first Monday after the first day of January of any one year to and excluding the first Monday after the first day of January of the next succeeding year. En. March 11, 1872. Am'd. 1880, 23.

Term, when commenced: See Const. Cal., art. 6, sec. 3.

§ 42. **Vacancies.** If a vacancy occur in the office of a justice of the supreme court, the governor shall appoint an eligible person to hold the office until the election and qualification of a justice to fill the vacancy, which election shall take place at the next succeeding general election; and the justice so elected shall hold the office for the remainder of the unexpired term of his predecessor. En. March 11, 1872. Am'd. 1880, 23.

Vacancy in office: See Const. Cal., art. 6, sec. 3.

Vacancy: See the subject generally, Pol. Code, secs. 995 et seq.

Absence or inability of chief justice to act: See post, sec. 46.

Vacancy in office of judge does not affect pending proceedings: See post, sec. 184.

§ 43. **Departments.** There shall be two departments of the supreme court, denominated respectively department one and department two. The chief justice shall assign three of the associate justices to each department, and such assignment may be changed by him from time to time; provided, that the associate justices shall be competent to sit in either department, and may interchange with one another by agreement among themselves, or if no such agreement be made as ordered by the chief justice. The chief justice may sit in either department, and shall preside when so sitting; but the justices assigned to each department shall select one of their number as presiding justice. Each of the departments shall have the power to

hear and determine causes and all questions arising therein, subject to the provisions in relation to the court in bank. The presence of three justices shall be necessary to transact any business in either of the departments, except such as may be done at chambers; but one or more of the justices may adjourn from time to time with the same effect as if all were present, and the concurrence of three justices shall be necessary to pronounce a judgment; provided, that if three do not concur, the cause may be reheard in the same department, or transmitted to the other department, or to the court in bank. En. March 11, 1872. Am'd. 1873-4, 281; 1880, 23.

Cal. Rep. Cit. 104, 135.

Departments: See Const. Cal., art. 6, sec. 2.

§ 44. Apportionment of business. The chief justice shall apportion the business to the departments, and may, in his discretion, order any cause pending before the court to be heard and decided by the court in bank. The order may be made before or after judgment pronounced by a department; but when a cause has been allotted to one of the departments and a judgment pronounced therein, the order must be made within thirty days after such judgment, and concurred in by two associate justices; and if so made, it shall have the effect to vacate and set aside the judgment. Any four justices may, either before or after judgment by a department, order a cause to be heard in bank. If the order be not made within the time above limited, the judgment shall be final; provided that no judgment by a department shall become final until the expiration of the period of thirty days aforesaid, unless approved by the chief justice in writing, with the concurrence of two associate justices. En. March 11, 1872. Am'd. 1880, 23.

Similar provision in constitution: See Const., art. 6, sec. 2.

§ 45. Court in bank. The chief justice, or any four justices, may convene the court in bank at any time, and the chief justice shall be the presiding justice of the court when so convened. The presence of four justices shall be necessary to transact any business, and the concurrence

of four justices present at the argument shall be necessary to pronounce a judgment in the court in bank; provided, that if four justices so present do not concur in a judgment, then all the justices qualified to sit in the cause shall hear the argument, but to render a judgment a concurrence of four justices shall be necessary; and every judgment of the court in bank shall be final, except in cases in which no previous judgment has been rendered in one of the departments, and in such cases the judgment of the court in bank shall be final, unless within thirty days after such judgment an order be made in writing, signed by five justices, granting a rehearing. En. March 11, 1872. Am'd. 1880, 24.

Cal. Rep. Cit. 72, 540; 81, 460; 81, 466; 81, 470; 81, 472; 81, 475; 81, 477; 81, 480.

Const. Cal., art. 6, sec. 2.

§ 46. **Absence or disability of chief justice.** In case of the absence of the chief justice from the place at which the court in bank is held, or his inability to act, the associate justices shall select one of their own number to perform the duties and exercise the powers of the chief justice during such absence or inability to act. En. March 11, 1872. Am'd. 1880, 24.

Const. Cal., art. 6, sec. 2.

§ 47. **Sessions.** The supreme court shall always be open for the transaction of business. It shall hold regular session for the hearing of causes, either in bank, or in one or both of its departments, at the capital of the state, commencing on the first Mondays of May and second Mondays of November; at the city and county of San Francisco, commencing on the second Mondays of January and third Mondays of July; and at the city of Los Angeles, commencing on the first Mondays of April and second Mondays of October; and special sessions at either of the above-named places at such other times as may be prescribed by the justices thereof. The justices and officers of the supreme court shall be allowed their actual traveling expenses in going to and from their respective places of residence upon the business of the court, or to attend its sessions. If proper rooms in which to hold the court, and for the accommodation of the officers thereof, are not pro-

vided by the state, together with attendants, furniture, fuel, lights and stationery, suitable and sufficient for the transaction of business, the court, or any three justices thereof, may direct the clerk of the supreme court to provide such rooms, attendants, furniture, fuel, lights, and stationery; and the expenses thereof, certified by any three justices to be correct, shall be paid out of the state treasury, for which expenses, and to defray the traveling expenses of the justices and officers of the supreme court above mentioned, a sufficient sum shall be annually appropriated out of any funds in the state treasury not otherwise appropriated. The moneys so appropriated shall be subject to the order of the clerk of the supreme court, and be by him disbursed on proper vouchers, and the same shall be accounted for by him in annual settlements with the controller of state on the first Monday of December of each year. En. March 11, 1872. Am'd. 1880, 24.

Cal. Rep. Cit. 74, 606; 74, 607.

Always open: Const. Cal., art. 6, sec. 2, and sec. 134, post.

§ 48. Adjournments. Adjournments from day to day or from time to time, are to be construed as recesses in the sessions, and shall not prevent the court, or either of its departments, from sitting at any time. En. March 11, 1872. Am'd. 1880, 25.

Const. Cal., art. 6, sec. 2.

Terms of court: This section, with section 74, post, does away with the terms of courts. See, also, post, sections 88 and 104 as to justices' courts.

§ 49. Decisions in writing. In the determination of causes, all decisions of the supreme court in bank, or in departments, shall be given in writing, and the grounds of the decision shall be stated. En. March 11, 1872. Am'd. 1877-78, 22; 1880, 25.

Const. Cal., art. 6, sec. 2.

§ 50. Jurisdiction of two kinds. The jurisdiction of the supreme court is of two kinds:

1. Original; and,
2. Appellate. En. March 11, 1872. Am'd. 1873-4, 395; 1877-8, 22; 1880, 25.

See subsequent sections of this chapter.

§ 51. **Original jurisdiction.** In the exercise of its original jurisdiction the supreme court shall have power to issue writs of mandamus, certiorari, prohibition, and habeas corpus; and it shall also have power to issue all other writs necessary and proper to the complete exercise of its appellate jurisdiction. En. 1877-8, 22. Am'd. 1880, 25.

Cal. Rep. Cit. 81, 616.

Const. Cal., art. 6, sec. 4.

Mandamus: Post, secs. 54, 76, 165, 1084 et seq., 1108-1110.

Certiorari: Post, secs. 54, 76, 165, 1067 et seq., 1108-1110.

Prohibition: Post, secs. 54, 76, 165, 1102 et seq., 1108-1110.

Habeas corpus: See Const., art. 6, sec. 4; also, post, secs. 54, 76, 165; generally, Pen. Code, secs. 1473 et seq.

Injunction: Post, secs. 54, 76, 165, 356, 525 et seq., 745, 1341.

Scire facias abolished: Post, sec. 802.

Quo warranto: Post, secs. 76, 803-810.

Writ: Defined, ante, sec. 17; seal: Post, sec. 153; issuance: Post, sec. 54; service by telegraph: Post, sec. 1017.

Powers of single justice to issue writs: See post, sec. 54.

Ne exeat: See post, secs. 478 et seq.

§ 52. **Appellate jurisdiction.** The supreme court shall have appellate jurisdiction:

1. In all cases in equity, except such as arise in justices' courts.

2. In all cases at law which involve the title or possession of real estate, or the legality of any tax, impost, assessment, toll or municipal fine, or in which the demand, exclusive of interest, or the value of the property in controversy, amounts to three hundred dollars.

3. In all cases of forcible entry and detainer, proceedings in insolvency, actions to prevent or abate a nuisance, and in all such probate matters as may be provided by law.

4. In all special proceedings.

5. In all criminal cases prosecuted by indictment or information, in a court of record, on questions of law alone. En. Stats. 1880, 25.

Cal. Rep. Cit. 60, 115; 60, 654; 67, 212; 118, 485; 134, 612.

Appellate jurisdiction: Const. Cal., art. 6, sec. 4.

Appeals in general: Secs. 936 et seq.

Appeals to supreme court: Secs. 963 et seq.

§ 53. Powers in appealed cases. The supreme court may affirm, reverse, or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had. The decision of the court shall be given in writing, and in giving its decision, if a new trial be granted, the court shall pass upon and determine all the questions of law involved in the case, presented upon such appeal, and necessary to the final determination of the case. Its judgment in appealed cases shall be remitted to the court from which the appeal was taken. En. Stats. 1880, 25.

Cal. Rep. Cit. 60, 471; 81, 465; 118, 469; 132, 285.

Errors and defects are to be disregarded: Post, sec. 475.

Records, though not conclusive, are presumed correctly to determine the rights of the parties: Sec. 1963, subd. 17.

Costs on appeal: Post, sec. 1027.

Remittitur: Post, sec. 958.

§ 54. Concurrence necessary to transact business. The concurrence of three justices of the supreme court is necessary for the issuance of any writ, or the transaction of any business, except such as can be done at chambers; provided, that each of the justices shall have power to issue writs of habeas corpus to any part of the state upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself or the supreme court, or any department, or judge thereof, or before any superior court in the state or any judge thereof. En. March 11, 1872. Am'd. 1880, 25.

See Const. Cal., art. 6, sec. 2.

Business at chambers: Post, sec. 165.

Habeas corpus: See U. S. Const., art. 8, Amdts., and Const. Cal., art. 6, sec. 4; also, post, secs. 76, 165; generally, Pen. Code, secs. 1268 et seq., 1473 et seq., 1492 et seq.

§ 55. Transfer of books, papers, and actions. All records, books, papers, causes, actions, proceedings, and appeals lodged, deposited, or pending in the supreme court abolished by the constitution, are transferred to the supreme court herein provided for, which has the same power

and jurisdiction over them as if they had been in the first instance lodged, deposited, filed, or commenced therein, or, in cases of appeal, appealed thereto. En. March 11, 1872. Am'd. 1880, 25.

Const. Cal., art. 22, sec. 3.

§ 56. **Remittiturs in transferred cases.** In all cases of appeal transferred to the supreme court, its judgments shall be remitted to the superior courts of the counties, or cities and counties, from which the appeals were taken respectively, with the same force and effect as if said cases had been appealed to the supreme court from such superior courts. En. March 11, 1872. Am'd. 1880, 26.

§ 57. **Appeals in probate proceedings and contested election cases.** Appeals in probate proceedings and contested election cases shall be given preference in hearing in the supreme court, and be placed on the calendar in the order of their date of issue, next after cases in which the people of the state are parties. En. March 11, 1872. En. Stats. 1887, 82. Am'd. 1908, 69.

Cal. Rep. Cit. 45, 243; 47, 605; 49, 467; 134, 612.

§ 58. En. March 11, 1872. Am'd. 1873-4, 397; 1875-6, 83 Rep. 1880, 21.

§ 59. En. March 11, 1872. Am'd. 1875-6, 83. Rep. 1880, 21.

§ 60. En. March 11, 1872. Am'd. 1877-8, 93. Rep. 1880, 21.

§ 61. En. March 11, 1872. Rep. 1880, 21.

Cal. Rep. Cit. 71, 397.

§ 62. En. March 11, 1872. Rep. 1880, 21.

§ 63. En. March 11, 1872. Rep. 1880, 21.

§ 64. En. March 11, 1872. Am'd. 1875-6, 84. Rep. 1880, 21.

CHAPTER IV.

SUPERIOR COURTS.

- 65. Judges and elections.
- 66. Superior courts of two or more judges.
- 67. Superior courts of the city and county of San Francisco.
- 68. Terms of office.
- 69. Computation of years of office.
- 70. Vacancies.
- 71. Superior courts by judges of other counties.
- 72. Judges pro tempore.
- 73. Sessions.
- 74. Adjournments.
- 75. Jurisdiction of two kinds.
- 76. Original jurisdiction.
- 77. Appellate jurisdiction.
- 78. Process.
- 79. Transfer of books, papers, and actions.

§ 65. Judges and elections. There shall be in each of a superior court, for each of which one judge, and for the organized counties, or cities and counties, of the state, some of which two or more judges, as hereinafter in subsequent sections specially provided, shall be elected by the qualified electors of the county, or city and county, at the general state elections next preceding the expiration of the terms of office of their predecessors respectively; provided, that in and for the counties of Yuba and Sutter combined, only one superior judge shall be elected, who shall hold the superior courts of both said counties, and in accordance with such rules for the dispatch of business in both said counties as he may adopt. En. March 11, 1872. Am'd. 1880, 26.

Number of superior judges: See Const. Cal., art. 6, sec. 6.

Jurisdiction of superior courts: See post, secs. 75-78.

Acts increasing and reducing number of judges in various counties: See post, Appendix, Courts.

Separate judges for Sutter and Yuba: See Stats. 1897, p. 48.

§ 66. Superior courts of two or more judges. In each of the counties of Alameda, Los Angeles, Sacramento, San Joaquin, Santa Clara, and Sonoma, there shall be elected two judges of the superior court; and in each of said counties, and in any county, or city and county, other than the city and county of San Francisco, in which there shall

be more than one judge of the superior court, the judges of such court may hold as many sessions of said court at the same time as there are judges thereof, and shall apportion the business among themselves as equally as may be. En. March 11, 1872. Am'd. 1880, 26.

Number of superior judges: See Const. Cal., art. 6, secs. 6, 7.

Acts increasing and reducing number of judges in various counties: See post, Appendix, Courts.

§ 67. Superior court of the city and county of San Francisco. In the city and county of San Francisco there shall be elected twelve judges of the superior court, any one or more of whom may hold court; and there may be as many sessions of said court at the same time as there are judges thereof. The said judges shall choose from their own number a presiding judge, who may at any time be removed and another chosen in his place, by a vote of any seven of them. The presiding judge shall distribute the business of the court among the judges thereof, and prescribe the order of business. The judgments, orders, and proceedings of any session of the superior court, held by any one or more of the judges of said court, shall be equally effective as if all the judges of said court presided at such session. En. March 11, 1872. Am'd. 1873-4, 398; 1880, 26.

Number of superior judges: See Const. Cal., art. 6, sec. 6.

Process: Post, sec. 78.

Act allowing superior judges of San Francisco to appoint secretary: See post, Appendix, Courts.

§ 68. Terms of office. The term of office of judges of the superior court shall be six years from and after the first Monday of January next succeeding their election; provided, that the twelve judges of the superior court elected in the city and county of San Francisco at the general state election of eighteen hundred and seventy-nine shall have so classified, or shall so classify themselves, by lot, that four of them shall go out of office at the end of one year, four of them at the end of three years, and four of them at the end of five years from the first Monday of January, eighteen hundred and eighty; and the entry of such classification shall have been, or shall be,

made in the minutes of the court, signed by them, and a duplicate thereof filed in the office of the secretary of state; and provided further, that all the other superior judges elected at the general state election of eighteen hundred and seventy-nine shall go out of office at the end of five years from the first Monday of January, eighteen hundred and eighty. En. March 11, 1872. Am'd. 1875-6, 84; 1880, 27.

Term of Office: See Const. Cal., art. 6, sec. 6.

§ 69. Computation of years of office. The years during which a judge of a superior court is to hold office are to be computed respectively from and including the first Monday of January of any one year to and excluding the first Monday of January of the next succeeding year. En. March 11, 1872. Am'd. 1880, 27.

Cal. Rep. Cit. 99, 44.

Computation of time: See Const. Cal., art. 6, sec. 6. See sec. 41, ante.

§ 70. Vacancies. If a vacancy occur in the office of judge of a superior court, the governor shall appoint an eligible person to hold the office until the election and qualification of a judge to fill the vacancy, which election shall take place at the next succeeding general election, and the judge so elected shall hold office for the remainder of the unexpired term. En. March 11, 1872. Am'd. 1873-4, 399; 1880, 27.

Vacancy filling: See Const. Cal., art. 6, sec. 6. See sec. 42, ante.

Vacancies in office, and the mode of supplying them: See Pol. Code, secs. 995 et seq.

Vacancy does not affect pending proceedings: See post, sec. 184.

§ 71. Superior courts by judges of other counties. A judge of any superior court may hold the superior court in any county, at the request of the judge or judges of the superior court thereof, and upon the request of the governor, it shall be his duty to do so; and in either case the judge holding the court shall have the same power as a judge thereof. En. March 11, 1872. Am'd. 1880, 27.

Cal. Rep. Cit. 56, 329; 75, 221; 87, 397; 97, 177; 126, 620.

Sitting for another judge: See Const. Cal., art. 6, sec. 8. See post, sec. 160.

§ 72. Judges pro tempore. Any cause in a superior court may be tried by a judge pro tempore, who must be a member of the bar admitted to practice before the supreme court, agreed upon in writing by the parties litigant, or their attorneys of record, approved by the court, and sworn to try the cause; and his action in the trial of such cause shall have the same effect as if he were a judge of such court. A judge pro tempore shall, before entering upon his duties in any cause, take and subscribe the following oath or affirmation: "I do solemnly swear (or affirm, as the case may be) that I will support the constitution of the United States and the constitution of the state of California, and that I will faithfully discharge the duties of the office of judge pro tempore in the cause wherein ——— is plaintiff, and ——— is defendant, according to the best of my ability." En. March 11, 1872. Am'd. 1880, 27.

Judge pro tempore: Const. Cal., art. 6, sec. 8.

Superior judge must be admitted before supreme court: See post, sec. 157.

§ 73. Sessions. The superior court shall be always open (legal holidays and non-judicial days excepted) and they shall hold their session at the county seats of the several counties, or cities and counties, respectively. They shall hold regular sessions, commencing on the first Mondays of January, April, July, and October, and special sessions at such other times as may be prescribed by the judge or judges thereof; provided, that in the city and county of San Francisco the presiding judge shall prescribe the times of holding such special sessions. En. March 11, 1872. Am'd. 1880, 27.

Cal. Rep. Cit. 69, 544; 119, 616; 142, 500.

Duties of superior judges generally: See Pol. Code, sec. 4134.

Always open: See Const. Cal., art. 6, sec. 5; post, secs. 104, 134.

Holidays, etc.: See ante, sec. 10; post, sec. 134, 135.

§ 74. **Adjournments.** Adjournments from day to day, or from time to time, are to be construed as recesses in the sessions, and shall not prevent the court from sitting at any time. En. March 11, 1872. Am'd. 1880, 28.

Cal. Rep. Cit. 69, 544; 69, 545; 119, 616; 142, 500.

Adjournments from time to time mere recesses in the sessions: See ante, sec. 48.

§ 75. **Jurisdiction of two kinds.** The jurisdiction of the superior courts is of two kinds:

1. Original; and,

2. Appellate. En. March 11, 1872. Am'd. 1880, 28.

§ 76. **Original jurisdiction.** The superior courts shall have original jurisdiction:

1. In all cases in equity.

2. In all civil actions in which the subject of litigation is not capable of pecuniary estimation.

3. In all cases at law which involve the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine, and in all other cases in which the demand, exclusive of interest or the value of the property in controversy, amounts to three hundred dollars.

4. Of actions of forcible entry and detainer, of proceedings in insolvency, of actions to prevent or abate a nuisance, of all matters of probate, of divorce, and for annulment of marriage, and of all such special cases and proceedings as are not otherwise provided for.

5. In all criminal cases amounting to felony, and cases of misdemeanors not otherwise provided for. Said courts shall have the power of naturalization, and to issue papers therefor. Said courts and their judges, or any of them, shall have power to issue writs of mandamus, certiorari, prohibition, quo warranto, and of habeas corpus on petition by or on behalf of any person in actual custody, in their respective counties. Injunctions and writs of prohibition may be issued and served on legal holidays and nonjudicial days. En. March 11, 1872. Am'd. 1873-4, 281; 1880, 28.

Cal. Rep. Cit. 54, 150; 69, 557; 69, 559; 71, 88; 83, 473; 84, 120; 87, 232; 138, 154. Subd. 3—86, 461.

Jurisdiction of superior court: See Const. Cal., art. 6, sec. 5.

Venue of actions: Secs. 392 et seq., post.

Nuisance: Secs. 52 ante, 731 post.

Act conferring upon superior judges powers of probate, district and county judges: See post, Appendix, Courts.

§ 77. Appellate jurisdiction. The superior courts shall have appellate jurisdiction in such cases arising in justices' and other inferior courts in their respective counties as may be prescribed by law. En. March 11, 1872. Am'd. 1880, 28.

Cal. Rep. Cit. 136, 636.

Appellate jurisdiction: See Const. Cal., art. 6, sec. 5.

Appeals to superior court: See post, secs. 974-980.

§ 78. Process. The process of the superior courts shall extend to all parts of the state; provided, that all actions for the recovery of the possession of, quieting the title to, or for the enforcement of liens upon real estate, shall be commenced in the county in which the real estate, or any part thereof affected by such action or actions, is situated. En. March 11, 1872. Am'd. 1880, 28.

Cal. Rep. Cit. 136, 636.

Process extends to all parts of state: See Const. Cal., art. 6, sec. 5.

Place of trial: See Const. Cal., art. 6, sec. 5; also sec. 392, post.

§ 79. Transfer of books, papers, and actions. All records, books, papers, causes, actions, proceedings and appeals lodged, deposited, or pending in the district court or courts, county court, probate court, municipal criminal court, or municipal court of appeals, of, in, or for any county, or city and county, of the state, abolished by the constitution, are transferred to the superior court of such county, or city and county, which has the same power and jurisdiction over them as if they had been in the first instance lodged, deposited, filed, or commenced therein, or, in cases of appeal, appealed thereto. En. Stats. 1880, 28.

Transfer of books, papers, and actions: See Const. Cal., art. 22, sec. 3; ante, secs. 55, 56.

Act conferring upon superior court, powers of district, county, and probate courts: See post, Appendix, Courts.

Act transferring to superior court business, records, etc., of courts in existence under old constitution: See post, Appendix, Records.

§§ 80, 81. No such sections.

§ 82. En. March 11, 1872. Rep. 1880, 21.

§ 83. En. March 11, 1872. Rep. 1880, 21.

§ 84. En. March 11, 1872. Rep. 1880, 21.

CHAPTER V.

JUSTICES' COURTS.

Article I. Of Justices' Courts in Cities and Counties, §§ 85-98.

II. Of Justices' Courts in Townships, §§ 103-107.

III. Justices of the Peace and Justices' Courts in General, § 110-115.

ARTICLE I.

JUSTICES' COURTS IN CITIES AND COUNTIES.

85. Justices' court and justices.

86. Justices' clerk.

87. Sheriff and deputies.

88. Offices and office hours.

89. Actions.

90. Reassignment and transfer of actions.

91. Payment of fees.

92. Certificates, transcripts, and other papers.

93. Justices' docket.

94. Territorial extent of jurisdiction.

95. Practice and rules.

96. Attorneys.

97. Salaries.

98. What justices successors of others.

Gen. Cit. to Chap.—Cal Rep. Cit. 114, 332.

§ 85. Justices' court and justices. There shall be in every city and county of more than one hundred thousand population a justices' court, for which five justices of the peace shall be elected by the qualified electors of such city and county, at the general state election next preceding the expiration of the terms of office of their predecessors. Any of said justices may hold court, and there may be as many sessions of said court at the same time as there are justices thereof. The said justices shall choose one of

their number to be presiding justice, who may at any time be removed and another appointed in his place by a vote of a majority of them; provided, that in case of the temporary absence or disability of the presiding justice, any one of the other justices, to be designated by the presiding justice, may act as presiding justice during such absence or disability. En. March 11, 1872. Am'd. 1873-4, 282; 1880. 29.

Cal. Rep. Cit. 52, 223; 53, 413; 53, 414; 58, 561; 114, 332.

Number of justices and their duties and powers: See Const. Cal., art. 6, sec. 11.

Act of March 26th, 1866, organizing San Francisco justices' court with amendments of 1869-70, p. 56; 1871-2, p. 758, governed in San Francisco before 1880.

Justices' courts: Compare secs. 103, 110, post.

Act providing that mayor of certain cities shall not act as justice: See post, Appendix, Courts.

§ 86. Justices' clerk. The supervisors of such city and county shall appoint a justice's clerk, on the written nomination and recommendation of said justices, or a majority of them, who shall hold office for two years, and until his successor is in like manner appointed and qualified. Said justices' clerk shall take the constitutional oath of office, and give bond in the sum of ten thousand dollars for the faithful discharge of the duties of his office, and in the same manner as is or may be required of other officers of such city and county. A new or additional bond may be required by the supervisors of such city and county, and in such amount as may be fixed by said supervisors, whenever they may deem it necessary. The justices' clerk shall have authority to appoint two deputy clerks, for whose acts he shall be responsible on his official bond, the said deputy clerks to hold office during the pleasure of said clerk. Said justices' clerk and deputy shall have authority to administer oaths, and take and certify affidavits in any action, suit, or proceeding in said justices' court. En. March 11, 1872. Am'd. 1880, 29.

Justices' clerks and deputies in cities and counties over two hundred thousand, act relating to appointment of: See post, Appendix, Justices of the Peace.

§ 87. Sheriff and deputies. The sheriff of such city and county shall be ex officio an officer of said court, and it shall be his duty to serve or execute, or cause to be served and executed, each and every process, writ, or order that may be issued by said justices' court; provided, that a summons issued from said court may be served and returned as provided in section eight hundred and forty-nine of this code; and that subpoenas may be issued by the justices' clerk, and served as provided in section one thousand nine hundred and eighty-seven and one thousand nine hundred and eighty-eight of this code. The said sheriff may appoint, in addition to the other deputies allowed by law, three deputies, whose duty it shall be to assist said sheriff in serving and executing the process, writs, and orders of the said justices' court. Said deputies shall receive a salary of one hundred and twenty-five dollars per month each, payable monthly out of the city and county treasury, and out of the special fee fund, after being first allowed and audited as other demands are by law required to be audited and allowed. One of said deputies shall remain in attendance during the sessions of said court, and at such other times as the said court or the presiding justice thereof may order and direct, for the purpose of attending to such duties as may be imposed on said sheriff or said deputies, as herein provided, or required by law. The said sheriff shall be liable on his official bond for the faithful performance of all duties required of him or any of his said deputies. En. March 11, 1872. Am'd. 1880, 30.

Sheriff generally: See Pol. Code, secs. 4175 eq seq.

§ 88. Offices and office hours. The supervisors of such city and county shall provide, in some convenient locality in the city and county, a suitable office or suite of offices for said presiding justice, justices' clerk, deputy clerk, and deputy sheriff, and offices suitable for holding sessions of said court, and separate from one another, for each of said justices of the peace, together with attendants, furniture, fuel, lights, and stationery sufficient for the transaction of business; and if they are not provided, the court may direct the sheriff to provide the same, and the expenses incurred, certified by the justices to be correct, shall be a charge against the city and county treasury, and paid out of the general fund thereof. The said justices, justices' clerk, and deputy clerk shall be in attendance at their respective offices, for the dispatch of official business daily,

from the hour of eight o'clock a. m. until five o'clock p. m. En. March 11, 1872. Am'd. 1877-8, 95; 1880, 30.

Cal. Rep. Cit. 48, 90.

§ 89. Actions. All actions, suits, and proceedings in such city and county whereof justices of the peace or justices' court have jurisdiction, except those cases of concurrent jurisdiction that may be commenced in some other court, shall be entitled, "In the justices' court of the city and county of ——" (inserting the name of the city and county) and commenced and prosecuted in said justices' court, which shall be always open. The original process shall be returnable, and the parties summoned required to appear before the presiding justice, or before one of the other justices of the peace, to be designated by the presiding justice, at his office; but all complaints, answers, and other pleadings and papers required to be filed, shall be filed, and a record of all such actions, suits, and proceedings made and kept in the clerk's office aforesaid; and the presiding justice and each of the other justices shall have power, jurisdiction, and authority to hear, try, and determine any action, suit, or proceeding so commenced, and which shall have been made returnable before him, or may be assigned or transferred to him, or any motion, application, or issue therein (subject to the constitutional right of trial by jury), and to make any necessary and proper orders therein. En. March 11, 1872. Am'd. 1880, 30.

Concurrent jurisdiction: See sec. 113, post.

Jurisdiction of justices' court: See post, secs. 112 et seq.

§ 90. Reassignment and transfer of actions. In case of sickness or disability or absence of a justice of the peace (on the return of a summons or at the time appointed for trial) to whom a cause has been assigned, the presiding justice shall reassign the cause to some other justice, who shall proceed with the trial and disposition of said cause in the same manner as if originally assigned to him; and if, at any time before the trial of a cause or matter returnable or pending before any of said justices, either party shall object to having the cause or matter tried before such justice, on the ground that such justice is a material witness for either party, or on the ground of the interest, prejudice, or bias of such justice, and such objection be made to appear in the manner prescribed by section eight hundred and thirty-three of this code, the

said justice shall suspend proceedings, and the presiding justice, on motion and production before him of the affidavit and proofs, shall order the transfer of the cause or matter for trial before some other justice, to be designated by him. The presiding justice may, in like manner, assign or transfer any contested motion, application, or issue in law, arising in any cause returnable or pending before him or any other justice, to some other justice; and the said justice, to whom any cause, matter, motion, application, or issue shall be so as aforesaid, assigned or transferred, shall have power, jurisdiction, and authority to hear, try, and determine the same accordingly. En. March 11, 1872. Am'd. 1880, 31.

§ 91. Payment of fees. All legal process of every kind in actions, suits or proceedings in said justices' court, for the issue or service of which any fee is or may be allowed by law, shall be issued by the said justices' clerk upon the order of the presiding justice, or upon the order of one of the justices of the peace, acting as presiding justice, as in this article provided; and the fees for issuance and service of all such process, and all other fees which are allowed by law for any official services of justices, justices' clerks, or sheriff, shall be exacted and paid in advance into the hands of said clerk, and be by him daily, or weekly, or monthly, as the supervisors may require, and before his salary shall be allowed, accounted for in detail, under oath, and paid into the treasury of such city and county as part of the special fee fund thereof; provided, that such payment in advance shall not be exacted from parties who may prove to the satisfaction of the presiding justice that they have good cause of action, and that they are not of sufficient pecuniary ability to pay the legal fees; and no judgment shall be rendered in any action before said justices' court, or any of said justices, until the fees allowed therefor, and all fees for previous services therein, which are destined to be paid into the treasury, shall have been paid, except in cases of poor persons, as hereinbefore provided. En. Stats. 1880, 31.

Cal. Rep. Cit. 107, 118; 115, 552; 126, 29.

Fees: See Const. Cal., art. 6, sec. 15.

§ 92. Certificates, transcripts, and other papers. Cases which by the provisions of law are required to be certified to the superior court, by reason of involving the question

of title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine, shall be so certified by the presiding justice and justices' clerk; and for that purpose, if such question shall arise on the trial, while the case is pending before one of the other justices, such justice shall certify the same to the presiding justice. All abstracts and transcripts of judgments and proceedings in said court, or in any of the dockets or registers of or deposited in said court, shall be given and certified from any of such dockets or registers, and signed by the presiding justice and clerk, and shall have the same force and effect as abstracts and transcripts of justices of the peace in other cases. Appeals from judgments rendered in said court shall be taken and perfected in the manner prescribed by law; but the notice of appeal, and all the papers required to be filed to perfect it, shall be filed with the justices' clerk. Statements on appeals shall be settled by the justice who tried the cause. Sureties on appeal, or on any bond, or undertaking given in any cause or proceeding in said court, when required to justify, may justify before any one of the justices. En. Stats. 1880, 32.

Transfer to superior court: See sec. 838, post.

Appeals: See post, secs. 794 et seq.

§ 93. Justices' docket. In a suitable book, strongly bound, the justices' clerk shall keep a permanent record of all actions, proceedings, and judgments commenced, had, or rendered in said justices' court, which book shall be a public record, and be known as the "justices' docket," in which docket the clerk shall make the same entries as are provided for in section nine hundred and eleven of this code, and which said docket and entries therein shall have the same force and effect as is provided by law in reference to dockets of justices of the peace. To enable the clerk to make up such docket, each of the justices shall keep minutes of his proceedings in every cause returnable before or assigned or transferred to him for trial or hearing; and upon judgment or other disposition of a cause, such justice shall immediately certify and return the said minutes, together with all pleadings and papers in said cause, to the clerk's office, who shall immediately thereupon file the same and make the proper entries under the title of the action in the docket aforesaid. En. Stats. 1880, 32

Cal. Rep. Cit. 115, 85.

Docket generally: Post, secs. 911 et seq.; effect of, sec. 912.

§ 94. Territorial extent of jurisdiction. The jurisdiction of the justices' court of such city and county extends to the limits of the city and county, and its process may be served in any part thereof. En. March 11, 1872. Am'd. 1880, 32.

Jurisdiction: Secs. 112 et seq., 925, post.

Process, where runs: See post, sec. 106.

§ 95. Practice and rules. The justices' court and the justices of the peace of every such city and county shall be governed in their proceedings by the provisions of law regulating proceedings before justices of the peace, so far as such provisions are not altered or modified in this article, and the same are or can be made applicable in the several cases arising before them. The justices' courts of such city and county shall have power to make rules not inconsistent with the constitution and laws for the government of such justices' court and the officers thereof; but such rules shall not be in force until thirty days after their publication; and no rules shall be made imposing any tax or charge on any legal proceeding, or giving any allowance to any justice or officer for services. En. March 11, 1872. Am'd. 1880, 32.

Cal. Rep. Cit. 107, 118.

Provisions applicable: See post, secs. 832-926.

Rules of courts generally: See post, sec. 129.

§ 96. Attorneys. It shall not be lawful for any justice of the peace, justices' clerk, or sheriff of any such city and county, or any of their deputies, to appear or advocate, or in any manner act as attorney, counsel, or agent for any party or person in any cause, or in relation to any demand, account, or claim pending, or to be sued or prosecuted before said court or justices, or either of them; nor shall any person other than an attorney at law duly admitted to practice in courts of record, be permitted to appear as attorney or agent for any party in any cause or proceeding before said justice's court, or any of said justices, unless he produce a sufficient power of attorney to that effect, duly executed and acknowledged before some officer authorized by law to take acknowledgments of deeds, which power of attorney, or a copy thereof, duly certified by one of the justices (who on inspection of the original, and being satisfied of its genuineness, shall certify such copy),

shall be filed among the papers in such cause or proceeding. En. March 11, 1872. Am'd. 1880, 33.

Judicial officers, disqualifications: Post, secs. 170, 171, 172.

§ 97. Justices of the peace, San Francisco; salary. The justices of the peace shall receive for their official services the following salaries, and no other or further compensation, payable monthly, out of the city and county treasury, after being first allowed and audited as other similar demands are by law required to be allowed and audited: To each of the justices of the peace thirty-six hundred dollars per annum. En. March 11, 1872. Am'd. 1873-4, 282; 1880, 33; 1905, 9.

Cal. Rep. Cit. 56, 565.

§ 98. What justices successors of others. The justices of the peace elected in any such city and county at the general election of eighteen hundred and seventy-nine, or persons appointed to fill their places, are successors of the justices of the peace of such city and county who held office at the time of such election; and all records, registers, dockets, books, papers, causes, actions, and proceedings lodged, deposited, or pending before the justices' court or any justice of any such city and county, are transferred to the justices' court of such city and county herein provided for, which shall have the same power and jurisdiction over them as if they had been in the first instance lodged, deposited, filed, or commenced therein. En. March 11, 1872. Am'd. 1880, 33.

Cal. Rep. Cit. 63, 80.

Similar provisions with respect to supreme court: Sec. 55, ante; and the superior court, sec. 79, ante.

What justices successors of others: See post, sec. 107.

§ 99. En. March 11, 1872. Am'd. 1877-8, 97. Rep. 1880, 21.

§ 100. En. March 11, 1872. Rep. 1880, 21.

ARTICLE II.

JUSTICES' COURTS IN TOWNSHIPS.

- 103. Justices' courts and justices, election, number, qualification.
- 104. Courts, where held.
- 105. What justice may hold court for another.
- 106. Territorial extent of civil jurisdiction.
- 107. What justices successors of others.

§ 103. Justices' courts, number of in townships; election of justices; number of in cities; qualifications of justices; salaries. There shall be at least one justice's court in each of the townships of the state, for which one justice of the peace must be elected by the qualified electors of the township, at the general state election next preceding the expiration of the term of office of his predecessor. In any county where, in the opinion of the board of supervisors, the public convenience requires it, the said board may, by order, provide that two justices' courts may be established in any township, designating the same in such order; and in such case one justice of the peace must be elected in the manner herein provided for each of such courts. In every city or town of the third and the fourth class there must be one justice of the peace, and in every city or town of the first and one half class there must be three justices of the peace and in every city or town of the second class there must be two justices of the peace, to be elected in like manner by the electors of such cities or towns, respectively: and such justices of the peace of cities or towns, and justices' courts of cities or towns, shall have the same jurisdiction, civil and criminal, as justices of the peace of townships, and township justices' courts. Said justices of the peace of cities, and justices' courts of cities, shall also have jurisdiction of all proceedings for the violation of any ordinance of any city in which courts are established, both civil and criminal, and of all actions for the collection of any license required by any ordinance of any such city or town, and generally exercise all powers, duties and jurisdiction, civil and criminal, of police judges, judges of the police court, recorder's court, or mayor's court within such city.

No person is eligible to the office of justice of the peace in any city or town of the first, first and one half, second or third class who has not been admitted to practice law in a court of record; and no justice of the peace is permitted to practice law before another justice of the peace in the city, town or county in which he resides, or to have a partner engaged in the practice of law in any justice's court in such city, town or county. Every city justice of the peace in any city or town of the fourth class shall receive a salary of fifteen hundred dollars per annum, and every city justice of the peace in any city or town of the third class shall receive a salary of two thousand dollars per annum; and every city justice of the peace in any city or town of the first and one half class and the second class shall receive a salary of twenty-four hundred dollars per annum; and each city justice of the peace shall be provided by the city or town authorities with a suitable office in which to hold his court. Where the compensation of the justice of the peace of any city or town is by salary, it shall be paid by warrants drawn each month upon the salary fund, or, if there be no salary fund, then upon the general fund, of such city or town; such warrants to be audited and paid as salaries of other city officials. All fees which are chargeable by law for services rendered by such city justices of the peace in the cities or towns aforesaid shall be by them, respectively, collected, and on the first Monday of each month every such city or town justice of the peace shall make a report, under oath, to the city or town treasurer, of the amount of fees so by him collected, and pay the amount so collected into the city or town treasury, to the credit of the general fund thereof. Said salaries shall be the sole compensation of said city justices. En. Stats. 1880, 34. Am'd. 1891, 456; 1899, 88; 1900-01, 100; 1903, 210; 1905, 49; 1905, 50.

There were two amendments of this section enacted on the same day, March 3, 1905 (Stats. 1905, pp. 49, 50). They were identical in language but one was to go into effect immediately, and the other on the first Monday after the first day of January, 1907.

Cal. Rep. Cit. 58, 561; 58, 574; 58, 575; 58, 577; 59, 599; 67, 633; 73, 506; 85, 596; 102, 17; 133, 76.

Eligibility of justices of the peace: See post, sec. 159.

Disabilities: See post, secs. 170 et seq.

Fees: See Const. Cal., art. 6, sec. 15.

Act providing that mayor in certain cities shall not act as justice: See post, Appendix, Courts.

Creation of justices' courts in various places: See post, Appendix, Justices of the Peace.

Act fixing jurisdiction and providing compensation for justices in cities and towns: See post, Appendix, Justices of the Peace.

§ 104. **Courts, where held.** A justice's court may be held at any place selected by the justice holding the same, in the township for which he is elected or appointed; and such court shall be always open for the transaction of business. En. March 11, 1872. Am'd. 1880, 34.

Hours of justice: See ante, sec. 88.

§ 105. **What justice may hold court for another.** A justice of the peace of any township, or city, or city and county may hold the court of any other justice of the peace of any township, city and county, or city within the same county, at his written request, and while so acting shall be vested with all the powers of the justice for whom he so holds court. In which case the proper entry of the proceedings before the attending justice subscribed by him shall be made in the docket of the justice for whom he so holds the court; and the same shall be prima facie evidence of such proceedings, and form and become a part of the record of any, or any part of any and all actions, causes, or proceedings had before such attending justice while so holding the court. En. March 11, 1872. Am'd. 1880, 34; 1897, 8.

Cal. Rep. Cit. 98, 240; 116, 507.

With respect to superior courts: See sec. 71, ante.

§ 106. **Territorial extent of civil jurisdiction.** The civil jurisdiction of justices' courts extends to the limits of the townships in which they are held; but mesne and final process of any justices' court in a county may be issued to and served in any part of the county. En. March 11, 1872. Am'd. 1880, 34.

Cal. Rep. Cit. 66, 443.

Jurisdiction: See sec. 94, ante, and post, secs. 112 et seq. Process, where runs: See ante, sec. 96.

§ 107. **What justices successors of others.** The justices of the peace elected in the townships at the general state election of eighteen hundred and seventy-nine, or persons

appointed to fill their places, are successors of the justices of the peace of the townships, respectively, who held office at the time of such election; and, in case the townships of any county are hereafter changed or altered, the board of supervisors of such county shall make provision as to what justices shall be successors of the justices of townships so changed or altered. En. March 11, 1872. Am'd. 1880, 34.

Cal. Rep. Cit. 143, 247.

§ 108. En. March 11, 1872. Rep. 1880, 21.

§ 109. En. March 11, 1872. Rep. 1880, 21.

ARTICLE III.

JUSTICES OF THE PEACE AND JUSTICES COURTS IN GENERAL.

- 110. Terms of office.
- 111. Vacancies.
- 112. Civil jurisdiction.
- 113. Concurrent jurisdiction.
- 114. Civil jurisdiction restricted.
- 115. Criminal jurisdiction.

§ 110. Terms of office. The term of office of justices of the peace shall be four years from and after twelve o'clock meridian on the first Monday after the first day of January next succeeding their election. En. March 11, 1872. Am'd. 1880, 35; 1900-01, 630.

Cal. Rep. Cit. 58, 561; 66, 10; 67, 633; 102, 17; 133, 76; 133, 77.

§ 111. Vacancies. If a vacancy occurs in the office of a justice of the peace, the board of supervisors of the county shall appoint an eligible person to hold the office for the remainder of the unexpired term. En. Stats. 1880, 35.

Cal. Rep. Cit. 102, 15; 102, 16; 102, 17; 102, 18; 122, 139; 133, 75; 133, 76.

§ 112. Civil jurisdiction. The justices' courts shall have civil jurisdiction:

1. In actions arising on contract for the recovery of money only if the sum claimed, exclusive of interest, does not amount to three hundred dollars;

2. In actions for damages for injury to the person, or for taking, detaining, or injuring personal property, or for

injury to real property where no issue is raised by the verified answer of the defendant involving the title to or possession of the same, if the damage claimed do not amount to three hundred dollars;

3. In actions to recover the possession of personal property, if the value of such property does not amount to three hundred dollars;

4. In actions for a fine, penalty, or forfeiture, not amounting to three hundred dollars, given by statute, or the ordinance of an incorporated city and county, city or town, where no issue is raised by the answer involving the legality of any tax, impost, assessment, toll, or municipal fine;

5. In actions upon bonds or undertakings conditioned for the payment of money, if the sum claimed does not amount to three hundred dollars, though the penalty may exceed that sum;

6. To take and enter judgment for the recovery of money on the confession of a defendant, when the amount confessed, exclusive of interest, does not amount to three hundred dollars. En. March 11, 1872. Am'd. 1880, 35.

Cal. Rep. Cit. 60, 427; 69, 557; 91, 549; 97, 97; 102, 17; 111, 422; 139, 406. Subd. 1—127, 559. Subd. 2—135, 68. Subd. 4—80, 41; 130, 99.

Local and special legislation with respect to jurisdiction of justice is prohibited by article 4, section 25, constitution of 1879.

§ 113. Concurrent jurisdiction. The justices' courts shall have concurrent jurisdiction with the superior courts within their respective townships:

1. In actions of forcible entry and detainer, where the rental value of the property entered upon or unlawfully detained does not exceed twenty-five dollars per month, and the whole amount of damages claimed does not exceed two hundred dollars;

2. In actions to enforce and foreclose liens on personal property, where neither the amount of the liens nor the value of the property amounts to three hundred dollars. En. March 11, 1872. Am'd. 1877-8, 97; 1880, 35.

Cal. Rep. Cit. 90, 502; 130, 98; 130, 99. Subd. 1—137, 604.

Concurrent jurisdiction: See Const. Cal., art. 6, sec. 11.
 Forcible entry: See post, secs. 1159 et seq.

§ 114. **Civil jurisdiction restricted.** Except as in the last preceding section provided, the jurisdiction of the justices' courts shall not, in any case, trench upon the jurisdiction of the several courts of record of the state, nor extend to any action or proceeding against ships, vessels, or boats, for the recovery of seamen's wages for a voyage performed in whole or in part without the waters of this state. En. March 11, 1872. Am'd. 1880, 36.

Cal. Rep. Cit. 55; 267.

Not to trench upon jurisdiction of courts of record: See Const. Cal., art. 6, sec. 11.

Actions against vessels: Secs. 813 et seq.

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 repl'd.
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§ 115. **Criminal jurisdiction.** The justices' courts shall have jurisdiction of the following public offenses committed within the respective counties in which such courts are established:

1. Petit larceny;

2. Assault or battery not charged to have been committed upon a public officer in the discharge of his duties, or to have been committed with such intent as to render the offense a felony;

3. Breaches of the peace, riots, routs, affrays, committing a willful injury to property, and all misdemeanors punishable by fine not exceeding five hundred dollars, or imprisonment not exceeding six months, or by both such fine and imprisonment. En. March 11, 1872. Am'd. 1873-4, 399; 1880, 36.

Cal. Rep. Cit. 60, 104; 60, 152; 66, 4; 68, 413; 93, 236; 96, 365; 97, 528; 115, 54.

Act conferring power to act as police judges: See post, Appendix, Justices of the Peace.

§ 116. En. March 11, 1872. Rep. 1880, 21.

§ 117. En. March 11, 1872. Am'd. 1873-4, 283; 1875-6, 85. Rep. 1880, 21.

Cal. Rep. Cit. 53, 413.

§ 118. En. March 11, 1872. Rep. 1880, 21.

§ 119. En. Stats. 1873-4, 282. Rep. 1880, 21.

CHAPTER VI.

POLICE COURTS.

§ 121. Provided for in Political Code.

§ 121. Provided for in Political Code. Police courts are established in incorporated cities and counties, cities, and towns, and their organization, jurisdiction, and powers provided for in the Political Code, part four. En. March 11, 1872. Am'd. 1880, 36.

Cal. Rep. Cit. 66, 4; 99, 510.

Proceedings in civil actions: See post, secs. 929 et seq.
Police courts generally, their organization and jurisdiction: See Pol. Code, secs. 4424 et seq.

Act providing that mayors in certain cities shall not be required to act as police judge: See post, Appendix, Courts.

Act transferring business to after new constitution: See post, Appendix, Records.

CHAPTER VII.

GENERAL PROVISIONS RESPECTING COURTS OF JUSTICE.

Article I. Publicity of Proceedings, §§ 124, 125.

II. Incidental Powers and Duties of Courts, §§ 128-131.

III. Judicial Days, §§ 133-135.

IV. Proceedings in Case of Absence of Judge, §§ 139, 140.

V. Provisions Respecting Places of Holding Courts, §§ 142-144.

VI. Seals of Courts, §§ 147-153.

ARTICLE I.

PUBLICITY OF PROCEEDINGS.

§ 124. Sittings, public.

§ 125. Sittings, private.

§ 124. Sittings, public. The sittings of every court of justice shall be public, except as provided in the next section. En. March 11, 1872. Am'd. 1880, 36.

U. S. Const., art. 6, sec. 1, amds.

§ 125. Sittings, when private. In an action for divorce, criminal conversation, seduction, or breach of promise of marriage, the court may direct the trial of any issue of fact joined therein to be private, and may exclude all per-

sons except the officers of the court, the parties, their witnesses, and counsel; provided, that in any cause the court may, in the exercise of a sound discretion, during the examination of a witness, exclude any or all other witnesses in the cause. En. March 11, 1872. Am'd. 1873-4, 284; 1880, 36.

Cal. Rep. Cit. 43, 208; 99, 529; 99, 531; 103, 245.

Records in divorce and attachment proceedings to be kept secret: See Pol. Code, sec. 1032.

Exclusion of witnesses: Post, sec. 2043.

ARTICLE II.

INCIDENTAL POWERS AND DUTIES OF COURTS.

- § 128. Powers respecting conduct of proceedings.
- 129. Courts of record may make rules.
- 130. When rules take effect.
- 131. Probationary treatment of juvenile offenders.

§ 128. Powers respecting conduct of proceedings. Every court shall have power:

1. To preserve and enforce order in its immediate presence;
2. To enforce order in the proceedings before it, or before a person or persons empowered to conduct a judicial investigation under its authority;
3. To provide for the orderly conduct of proceedings before it, or its officers;
4. To compel obedience to its judgments, orders and process, and to the orders of a judge out of court, in an action or proceeding pending therein;
5. To control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter appertaining thereto;
6. To compel the attendance of persons to testify in an action or proceeding pending therein, in the cases and manner provided in this code;
7. To administer oaths in an action or proceeding pending therein, and in all other cases where it may be necessary in the exercise of its powers and duties;
8. To amend and control its process and orders so as to make them conformable to law and justice. En. March 11, 1872. Am'd. 1880, 37.

Cal. Rep. Cit. 47, 134; 53, 207; 54, 237; 64, 345; 79, 602; 96, 6; 112, 643. Subd. 5—140, 10. Subd. 6—140, 10. Subd. 8—82, 468.

Power of judicial officers: See post, sec. 177.

Contempt: See post, sec. 1209; in justice's court: See secs. 906 et seq.

Subd. 6. Attendance of witnesses: See post, secs. 1985 et seq.

Subd. 7. Administration of oaths: See post, secs. 2093 et seq.

§ 129. Courts of record may make rules. Every court of record may make rules not inconsistent with the laws of this state, for its own government and the government of its officers; but such rules shall neither impose any tax or charge upon any legal proceeding, nor give any allowance to any officer for services. En. March 11, 1872. Am'd. 1880, 37.

Cal. Rep. Cit. 81, 483; 86, 432.

Prac. Act, sec. 643. En. April 29, 1851.

When rules take effect: Sec. 130.

§ 130. When rules take effect. Rules adopted by the supreme court shall take effect sixty days, and rules adopted by superior courts, thirty days after their publication. En. March 11, 1872. Am'd. 1880, 37.

§ 131. Probationary treatment of juvenile offenders.

1. The judge of the superior court in and for each county or city and county of the state, or where there are more than one judge of said court, a majority of the judges thereof by an order entered in the minutes of such court, may appoint seven discreet citizens of good moral character, and of either sex, to be known as probation committee, and shall fill all vacancies occurring in such committee. The clerk of said court shall immediately notify each person appointed on said committee and thereupon said persons shall appear before the judge of said superior court in said county and qualify by taking oath, to be entered in the minutes of said superior court, to faithfully perform the duties of a member of such probation committee.

2. The members of such probation committee shall hold office for four years, and until their successors are appointed, provided that of those first appointed, one shall hold office for one year, two for two years, two for three years, and two for four years, the terms for which the respective members first appointed shall hold office to be

determined by lot as soon after their appointment as may be. When any vacancy occurs in any probation committee by expiration of the term of office of any member thereof, the successor shall be appointed to hold for the term of four years; when any vacancy occurs for any other reason, the appointee shall hold for the unexpired term of his predecessor.

3. The members of the probation committee shall serve without compensation.

4. The superior court or any judge thereof may at any time require said probation committee or a probation officer to examine into the qualifications and management of any society, association or corporation, other than a state institution, applying to receive any child or children under this act, and to report to the court, provided that nothing in this section shall be construed as giving any probation committee or probation officer any power to enter any institution without the consent of such institution.

It shall be the duty of each probation committee prior to December first in each year to prepare a report in writing on the qualifications and management of all societies, associations and corporations, except state institutions, applying for or receiving any child under this act from the courts of their respective counties, and in said report said committee may make such suggestions or comments as to them may seem fit; said report to be filed in the office of the clerk of the court appointing such committee, for the information of the judges thereof.

5. In counties of the first class there shall be one probation officer and not more than five deputy probation officers; in counties of the second class, one probation officer and not more than one deputy probation officer; in all other counties there shall be one probation officer.

In any county or city and county additional deputy probation officers may be appointed and their appointment approved or disapproved as hereinafter provided, from time to time when in the opinion of the court it may be necessary, provided that they serve without salary.

6. The probation officer and deputy probation officers in all the counties of the state shall be allowed such necessary incidental expenses as may be authorized by a judge of the superior court; and the same shall be a charge upon the county in which the court appointing them has jurisdiction, and the said expenses shall be paid out of the county treasury upon a warrant therefor issued by the said court.

7. The offices of probation officers and deputy probation officers are hereby created. The appointments of probation officers and deputy probation officers to serve hereunder in any county or city and county shall be made by the probation committee of said county or city and county from discreet citizens of good moral character. The appointments by each probation committee shall be made in writing, signed by a majority of the members of such committee, and filed with the county clerk of such county, and shall be subject to and shall take effect upon approval by the judge of the superior court appointing such committee, or by a majority of the judges thereof if there be more than one; such approval to be by order entered in the minutes of said court. The term of office of probation officers and of deputy probation officers shall be two years from the date of the said approval of their several appointments, such probation officers and deputy probation officers may at any time be removed by the judge approving their appointment in his discretion.

8. Any of the duties of the probation officer may be performed by a deputy probation officer and shall be performed by him whenever detailed to perform the same by the probation officer; and, it shall be the duty of the probation officer to see that the deputy probation officer performs his duties.

9. It is the intention of this act that the same probation committees, the same probation officers and deputy probation officers shall be appointed and serve under this act as under the act known as the juvenile court act, and entitled "An act defining and providing for the control, protection and treatment of dependent and delinquent children; prescribing the powers and duties of courts with respect thereto; providing for the appointment of probation officers, and prescribing their powers and duties; providing for the separation of children from adults when confined in jails or other institutions; providing for the appointment of boards to investigate the qualifications of organizations receiving children under this act, and prescribing the duties of such boards; and providing when proceedings under this act shall be admissible in evidence," and approved February 26, 1903; or under any laws amending or superseding the same.

10. Either at the time of the arrest for crime of any person over sixteen years of age, or at the time of the plea or verdict of guilty, the probation officer of the

county of the jurisdiction of said crime shall, when so directed by the court, inquire into the antecedents, character, history, family environment and offense of such person, and must report the same to the court and file his report in writing in the records of said court. His report shall contain his recommendation for or against the release of such person on probation. If any such person shall be released on probation and committed to the care of the probation officer, such officer must keep a complete and accurate record in suitable books of the history of the case in court and of the name of the probation officer, and his acts in connection with said case; also the age; sex; nativity; residence; education; habits of temperance; whether married or single; and the conduct, employment and occupation and parents' occupation and condition of such person so committed to his care during the term of such probation, and the result of such probation, which record shall be and constitute a part of the records of the court and shall at all times be open to the inspection of the court or any person appointed by the court for that purpose, as well as of all magistrates and the chief of police or other head of the police, unless otherwise ordered by the court. The said books of record shall be furnished by the county clerk of said county, and shall be paid for out of the county treasury.

11. The prohibition officer shall furnish to each person released on probation and committed to his care, a written statement of the terms and conditions of his probation, and shall report to the court, judge, or justice appointing him, any violation or breach of the terms and conditions imposed by such court on the person placed in his care.

12. The probation officers and deputy probation officers appointed under this section shall serve as such probation officers in all courts having original jurisdiction of criminal actions in this state.

13. Such probation officer and each deputy probation officer shall have, as to the person so committed to the care of such probation officer or deputy probation officer, the powers of a peace officer. En. Stats. 1903, 36. Am'd. 1905, 780.

ARTICLE III.

JUDICIAL DAYS.

- § 133. Days on which courts, etc., may be held.
 134. Nonjudicial days.
 135. Appointments on nonjudicial days.

§ 133. Days on which courts, etc., may be held. Courts of justice may be held and judicial business transacted on any day, except as provided in the next section. En. March 11, 1872. Am'd. 1880, 37.

Cal. Rep. Cit. 57, 406; 63, 421; 65, 621; 97, 392; 112, 610; 112, 611.

§ 134. Nonjudicial days. No court shall be open, nor shall any judicial business be transacted, on Sunday, on the first day of January, on the twenty-second day of February, on the thirtieth day of May, on the fourth day of July, on the ninth day of September, on the first Monday of September, on the twenty-fifth day of December, on a day upon which an election is held throughout the state, or by the governor of this state, for a public fast, thanksgiving, or holiday, except for the following purposes:

1. To give, upon their request, instructions to a jury when deliberating on their verdict.
2. To receive a verdict or discharge a jury.
3. For the exercise of the powers of a magistrate in a criminal action, or in a proceeding of a criminal nature.

Provided, that the supreme court and the superior courts shall always be open for the transaction of business; and provided further, that injunctions and writs of prohibition may be issued and served on any day. En. March 11, 1872. Am'd. 1880, 38; 1889, 46; 1893, 186; 1897, 15.

Cal. Rep. Cit. 57, 406; 63, 421; 65, 621; 112, 610; 112, 611; 138, 219; 147, 777.

Holidays. Secs. 10-13, ante.

Courts always open: Const. Cal., art. 6, sec. 5; secs. 47, 73, 104, ante.

Injunctions and writs of prohibition, issuance of, on nonjudicial days: Ante, sec. 76, subd. 5; and Const. Cal., art. 6, sec. 5.

§134
Am'd
p. 43

135
m'd.
433

§ 135. Appointments on nonjudicial days. If any day mentioned in the last section happen to be the day appointed for the holding or sitting of a court, or to which it is adjourned, it shall be deemed appointed for or adjourned to the next day. En. March 11, 1872. Am'd. 1880, 38.

ARTICLE IV.

PROCEEDINGS IN CASE OF ABSENCE OF JUDGE.

§ 139. Adjournment for absence of judge.

§ 140. Adjournment till next regular session.

139
m'd.
433

§ 139. Adjournment for absence of judge. If no judge attend on the day appointed for the holding or sitting of a court, or on the day to which it may have been adjourned, before noon, the sheriff or clerk shall adjourn the same until the next day, at 10 o'clock a. m., and if no judge attend on that day, before noon, the sheriff or clerk shall adjourn the same until the following day at the same hour, and so on, from day to day for one week, unless the judge, by written order, directs it to be adjourned to some day certain, fixed in said order, in which case it shall be so adjourned. En. March 11, 1872. Am'd. 1880, 38.

Nonjudicial day: Secs. 134, 135.

40
pl'd.
433

§ 140. Adjournment till next regular session. If no judge attend for one week, and no written order be made, as provided in the last section, the sheriff or clerk shall adjourn the session until the time appointed for the holding of the next regular session. En. March 11, 1872. Am'd. 1880, 38.

Sessions: Ante, sec. 73.

ARTICLE V.

PROVISIONS RESPECTING PLACES OF HOLDING COURTS.

142. Change in certain cases of place of holding court.
 143. Parties to appear at place appointed.
 144. When sheriff to provide courtrooms, etc.

§ 142. Change in certain cases of place of holding court. The judge or judges authorized to hold or preside at a court appointed to be held at a particular place in a city and county, county, city, or town, may, by an order filed with the city and county or county clerk, and published as he or they may prescribe, direct that the court be held or continued at any other place in the city and county, county, city or town than that appointed, when war, insurrection, pestilence, or other public calamity, or the danger thereof, or the destruction or danger of the building appointed for holding the court, may render it necessary; and may, in the same manner, revoke the order, and in his or their discretion, appoint another place in the same city and county, county, city or town, for holding the court. En. March 11, 1872. Am'd. 1880, 38.

§ 143. Parties to appear at place appointed. When the court is held at a place appointed, as provided in the last section, every person held to appear at the court must appear at the place so appointed. En. March 11, 1872. Am'd. 1880, 39.

§ 144. When sheriff to provide court-rooms, etc. If suitable rooms for holding the superior courts and the chambers of the judges of said courts be not provided in any city and county, or county, by the supervisors thereof, together with the attendants, furniture, fuel, lights, and stationery sufficient for the transaction of business, the courts, or the judge or judges thereof, may direct the sheriff of the city and county, or county, to provide such rooms, attendants, furniture, fuel, lights, and stationery, and the expenses incurred, certified by the judge or judges to be correct, shall be a charge against the city and county treasury, and paid out of the general fund thereof. En. March 11, 1872. Am'd. 1880, 39.

Cal. Rep. Cit. 64, 245; 91, 367; 93, 382; 93, 383; 96, 53.

ARTICLE VI.

SEALS OF COURTS.

- 147. What courts shall have seals
- 148. Seal of supreme court.
- 149. Seals of superior courts.
- 150. Seals of police courts of cities and counties.
- 151. Seals, how provided; private seals, when used.
- 152. Clerk of court to keep seal.
- 153. Seals of courts, to what documents affixed.

§ 147. What courts shall have seals. Each of the following courts shall have a seal:

1. The supreme court;
2. The superior courts;
3. The police court of every city and county. En. March 11, 1872. Am'd. 1880, 39.

Seal of Court—Judicial notice taken of: Post, sec. 1875, subd. 4; court commissioner may provide official seal, sec. 259, subd. 5.

Seals how made: Ante, sec. 14.

Police courts are not courts of record; See ante, secs. 33, 34, and yet have a seal.

§ 148. Seal of supreme court. The seal used by the supreme court, abolished by the constitution, shall be the seal of the supreme court herein provided for; but the said court may direct the clerk of the supreme court to provide two duplicates of said seal, each of which shall be considered the same as and have the same force and effect as the original. En. March 11, 1872. Am'd. 1880, 39.

§ 149. Seals of superior courts. The seals of the superior courts shall be circular, not less than one and three-fourths inches in diameter, and having in the center any word, words, or design adopted by the judges thereof, and the following inscription surrounding the same: "Superior Court, —, California," inserting the name of the county, or city and county; provided, that the seal of any such court, which has been adopted previous to the passage of this act, shall be the seal of such court, until another be adopted. En. March 11, 1872. Am'd. 1880, 39.

See act of March 31, 1880, validating writs, process and certificates issued from superior courts before seal provided: See Stats. 1880, p. 19.

§ 150. Seals of police courts of cities and counties. The police court of every city and county may use any seal having upon it the inscription, "Police Court, —," (inserting the name of the city and county). En. March 11, 1872. Am'd. 1880, 39.

Cal. Rep. Cit. 135, 352; 135, 353.

§ 151. Seals, how provided; private seals, when used. Courts which have not the necessary seal provided, or the judge or judges thereof, shall request the supervisors of their respective counties or cities and counties, to provide the same, and in case of their failure to do so, may order the sheriff to provide the same, and the expense thereof shall be a charge against the county or city and county treasury, and paid out of the general fund thereof; and until such seal be provided, the clerk of each court may use his private seal, whenever a seal is required. En. March 11, 1872. Am'd. 1880, 39.

§ 152. Clerk of court to keep seal. The clerks of the court shall keep the seal thereof. En. March 11, 1872. Am'd. 1873-4, 284; 1880, 40.

§ 153. Seals of courts, to what documents affixed. The seal of a court need not be affixed to any proceeding therein or document, except:

1. To a writ;
2. To the certificate of probate of a will, or of the appointment of an executor, administrator, or guardian;
3. To the authentication of a copy of a record, or other proceeding of a court, or of an officer thereof, or of a copy of a document on file in the office of the clerk. En. Stats. 1880, 40.

TITLE II.

JUDICIAL OFFICERS.

- Chapter I. Judicial Officers in General, §§ 156-161.
- II. Powers and Duties of Judges at Chambers, §§ 165-166.
- III. Disqualifications of Judges, §§ 170-172.
- IV. Incidental Powers and Duties of Judicial Officers, §§ 176-179.
- V. Miscellaneous Provisions Respecting Courts and Judicial Officers, §§ 182-187.

CHAPTER I.

JUDICIAL OFFICERS IN GENERAL.

- § 156. Qualifications of justices of supreme court.
- 157. Qualifications of superior judges.
- 158. Residence of superior judges.
- 159. Residence and qualification of justices of the peace.
- 160. Judges holding superior courts at request of governor.
- 161. Justices and judges ineligible to other than judicial office.

§ 156. Qualifications of justices of supreme court. No person shall be eligible to the office of chief or associate justice of the supreme court, unless he shall have been a citizen of the United States and a resident of this state for two years next preceding his election or appointment, nor unless he shall have been admitted to practice before the supreme court of the state. En. March 11, 1872. Am'd. 1880, 40.

Judge must be an attorney: Const. Cal., art. 6, sec. 23.

§ 157. Qualifications of superior judges. No person shall be eligible to the office of judge of a superior court unless he shall have been a citizen of the United States and a resident of this state, for two years next preceding his election or appointment, nor unless he shall have been admitted to practice before the supreme court of the state. En. March 11, 1872. Am'd. 1880, 40.

§ 158. Residence of superior judges. Each judge of a superior court shall reside at the county seat of the county

in which such court is held, or within three miles thereof, and within the county, except that in the counties of Yuba and Sutter the judge may reside in either of said counties; provided, that when there is more than one judge of the superior court in a county, it shall not be necessary for more than one judge to reside at the county seat, as provided herein. En. March 11, 1872. Am'd. 1880, 40; 1891, 277.

Act of March 2, 1897, Stats. 1897, p. 48, provided for separate judges for Sutter and Yuba counties.

§ 159. Residence and qualification of justices of the peace. Every justice of the peace shall reside in the city and county, or township, in which his court is held, and no person shall be eligible to the office of justice of the peace unless he shall have been a citizen of the United States, and a resident of the city and county, or county, in which he is to serve for one year next preceding his election or appointment. En. March 11, 1872. Am'd. 1880, 41.

§ 160. Judges holding superior courts at request of governor. If by reason of sickness, absence, disability, or other causes, a regular session of the superior court cannot be held in any county by the judge or judges thereof, or by a superior judge requested by him or them to hold such court, a certificate of that fact shall be transmitted by the clerk thereof to the governor, who may thereupon request some other superior judge to hold such court; and a judge so holding a court at the request of the governor, or at the request of the judge or judges of said superior court, shall be allowed his actual and necessary expenses in going to, returning from, and attending upon the business of such court, which shall be a charge against the treasury of the county where such court is held, and paid out of the general fund thereof. En. March 11, 1872. Am'd. 1875-6, 85; 1880, 41; 1887, 147.

Cal. Rep. Cit. 87, 397.

Holding court for another judge: Ante, sec. 71.

§ 161. Justices and judges ineligible to other than judicial office. The justices of the supreme court and judges of the superior courts shall be ineligible to any other office or public employment than a judicial office or employment

during the term for which they shall have been elected. En. March 11, 1872. Am'd. 1873-4, 284; 1880, 41.

Ineligible to public employment: Const. Cal., art. 6, sec. 18.

§ 162. En. March 11, 1872. Rep. 1873-4, 285; 1880, 21.

Cal. Rep. Cit. 110, 425.

CHAPTER II.

POWERS OF JUDGES AT CHAMBERS.

§ 165. Powers of justices of supreme court at chambers.

§ 166. Powers of superior judges at chambers.

§ 165. Powers of justices of supreme court at chambers. The justices of the supreme court, or any of them, may, at chambers, grant all orders and writs which are usually granted in the first instance upon an ex parte application, except writs of mandamus, certiorari, and prohibition; and may, in their discretion, hear applications to discharge such orders and writs. En. March 11, 1872. Am'd. 1880, 41.

Powers of judges out of court: Post, sec. 176.

§ 166. Powers of superior judges at chambers. The judge or judges of a superior court, or any of them, may, at chambers, grant all orders and writs which are usually granted in the first instance upon an ex parte application, and may, at chambers, hear and dispose of such orders and writs; and may also, at chambers, appoint appraisers, receive inventories and accounts to be filed, suspend the powers of executors, administrators, or guardians in the cases allowed by law, grant special letters of administration or guardianship, approve claims and bonds, and direct the issuance from the court of all writs and process necessary in the exercise of their powers in matters of probate. En. March 11, 1872. Am'd. 1880, 41.

Cal. Rep. Cit. 60, 227; 63, 444; 68, 641; 99, 513; 100, 601; 127, 64.

Power of judges out of court: Post, sec. 176.

Chamber hours for judges: Pol. Code, sec. 4116.

Power of judge of probate at chambers: Post, sec. 1305.

§ 167. En. March 11, 1872. Rep. 1880, 21.

Cal. Rep. Cit. 54, 179.

CHAPTER III.

DISQUALIFICATIONS OF JUDGES.

- § 170. Disqualification to sit or act.
171. Certain judges or county clerk not to practice law.
172. No judicial officer to have partner practicing law.

§ 170. Disqualification of judicial officer to sit or act. No justice, judge, or justice of the peace shall sit or act as such in any action or proceeding:

1. To which he is a party or in which he is interested;
2. When he is related to either party, or to an officer of a corporation which is a party, or to an attorney, counsel, or agent of either party, by consanguinity or affinity, within the third degree, computed according to the rules of law; provided, however, that if the parties to the action, or the executor, or administrator of the estate, or the guardian of the minor or incompetent person, or the receiver, or the commissioner, or the referee, or the attorney for a party in all special proceedings of a civil or criminal nature, shall sign and file in the action or matter, a stipulation in writing waiving the disqualification herein, the judge or court may proceed with the trial or hearing with the same legal effect as if no such disqualification existed.
3. When, in the action or proceeding, or in any previous action or proceeding involving any of the same issues, he has been attorney or counsel for either party; or when he has given advice to either party upon any matter involved in the action or proceeding;
4. When it appears from the affidavit or affidavits on file that either party cannot have a fair and impartial trial before any judge of a court of record about to try the case by reason of the prejudice or bias of such judge, said judge shall forthwith secure the services of some other judge, of the same or another county, to preside at the trial of said action or proceeding; provided, that in an action in the superior court of a county, or of a city and county, having more than one department, said action shall be transferred to another department thereof, and tried therein in the same manner as though originally assigned to such department. The affidavit or affidavits alleging the disqualification of a judge, must be filed and served upon the adverse party or the attorney for such party at least one day before the day set for trial of such action or proceeding; provided, counter-affidavits may be filed at least one day

thereafter, or such further time as the court may extend the time for filing such counter-affidavits, not exceeding five days, and for this purpose the court may continue the trial; and in no one cause or proceeding can more than one such change of judges be had. But the provisions of this section shall not apply to the arrangement of the calendar, or to the regulation of the order of business, nor the power of transferring the action or proceeding to some other court, or the hearing upon such affidavits and counter-affidavits. En. March 11, 1872. Am'd. 1880, 42; 1893, 234; 1897, 287; 1905, 467.

Cal. Rep. Cit. 55, 72; 56, 328; 58, 322; 59, 130; 66, 309; 66, 310; 83, 617; 91, 353; 94, 27; 94, 28; 97, 173; 97, 175; 98, 362; 100, 320; 103, 398; 105, 466; 105, 557; 115, 696; 121, 106; 121, 109; 123, 413; 123, 455; 126, 308; 129, 106; 132, 305; 136, 335; 141, 41. Subd. 1—118, 251; 121, 104; 121, 373; 126, 308. Subd. 2—91, 348; 120, 332. Subd. 4—123, 412; 129, 104; 130, 307; 131, 240; 131, 251; 132, 303; 132, 304; 136, 335; 136, 685; 139, 327; 143, 207.

Change of venue: Post, secs. 397 et seq.

Subd. 2. Consanguinity and affinity: See Civ. Code, secs. 1390 et seq.

Subd. 3. Judge cannot act as attorney: Post, secs. 171, 172.

§ 171. Certain judges or county clerk not to practice law. No justice, or judge of a court of record, or county clerk, shall practice law in any court of this state, nor act as attorney, agent, or solicitor in the prosecution of any claim or application for lands, pensions, patent rights or other proceedings, before any department of the state or general government, or courts of the United States during his continuance in office; nor shall any justice of the peace practice law before any justice's court in the county in which he resides. En. March 11, 1872. Am'd. 1880, 42; 1881, 78.

§ 172. No judicial officer to have partner practicing law. No justice, judge, or other elective judicial officer, or court commissioner, shall have a partner acting as attorney or counsel in any court of this state. En. March 11, 1872. Am'd. 1880, 42.

§ 173. En. March 11, 1872. Rep. 1880, 21.

CHAPTER IV.

INCIDENTAL POWERS AND DUTIES OF JUDICIAL OFFICERS.

176. Powers of judges out of court.
 177. Powers of judicial officers as to conduct of proceedings.
 178. To punish for contempt.
 179. To take acknowledgments and affidavits.

§ 176. Powers of judges out of court. A justice or judge may exercise out of court all the powers expressly conferred upon a justice or judge, as contradistinguished from the court. En. March 11, 1872. Am'd. 1880, 42.

Cal. Rep. Cit. 68, 641.

Powers of judge at chambers: Ante, secs. 165, 166.

Power to administer oaths: Post, sec. 179.

§ 177. Powers of judicial officers as to conduct of proceedings. Every judicial officer shall have power:

1. To preserve and enforce order in his immediate presence, and in proceedings before him, when he is engaged in the performance of official duty;

2. To compel obedience to his lawful orders as provided in this code;

3. To compel the attendance of persons to testify in a proceeding before him, in the cases and manner provided in this code;

4. To administer oaths to persons in a proceeding pending before him, and in all other cases where it may be necessary in the exercise of his powers and duties. En. March 11, 1872. Am'd. 1880, 42.

Cal. Rep. Cit. 65, 615; 140, 217; 140, 221. Subd. 1-140, 216. Subd. 4-140, 13; 140, 216.

Incidental powers of courts: Ante, sec. 128.

§ 178. To punish for contempt. For the effectual exercise of the powers conferred by the last section, a judicial officer may punish for contempt in the cases provided in this code. En. March 11, 1872. Am'd. 1880, 42.

Cal. Rep. Cit. 140, 13; 140, 216; 140, 217; 140, 221.

Contempt, generally: Post, sec. 1209; in justices' courts, post, sec. 906.

§ 179. To take acknowledgments and affidavits. Each of the justices of the supreme court, and judges of the superior courts, shall have power in any part of the state, and every justice of the peace within this city and county, or county, and a judge of a police or other inferior court within his city and county, city, or town, to take and certify:

1. The proof and acknowledgment of a conveyance of real property, or of any other written instrument;

2. The acknowledgment of satisfaction of a judgment of any court;

3. An affidavit or deposition to be used in this state. En. March 11, 1872. Am'd. 1880, 42.

Cal. Rep. Cit. 56, 465; 65, 615; 88, 410; 128, 420; 135,

175, 140, 13; 140, 221. Subd. 1—64, 300.

Subd. 1. Real property, acknowledgment of conveyance of: See Civ. Code, secs. 1180 et seq.

Subd. 2. Satisfaction of judgment. Post, sec. 675.

Subd. 3. Affidavit: Post, secs. 2009 et seq. Deposition: Post, secs. 2019 et seq.

CHAPTER V.

MISCELLANEOUS PROVISIONS RESPECTING COURTS AND JUDICIAL OFFICERS.

§ 182. Subsequent applications for orders refused, when prohibited.

182. Violations of preceding section.

184. Proceedings not affected by vacancy in office.

185. Proceedings to be in English language.

186. Abbreviations and figures.

187. Means to carry jurisdiction into effect.

§ 182. Subsequent applications for orders refused, when prohibited. If an application for an order made to a judge of a court in which the action or proceeding is pending is refused in whole or in part, or is granted conditionally, no subsequent application for the same order shall be made to any court commissioner, or any other judge, except of a higher court; but nothing in this section applies to motions refused for informality in the papers or proceedings necessary to obtain the order, or to motions refused with liberty to renew the same. En. March 11, 1872. Am'd. 1880, 43.

Cal. Rep. Cit. 61, 194; 69, 635; 89, 338; 115, 697; 131, 619.

Orders and motions generally: Post, secs. 1003 et seq.

Orders, appealable: Post, sec. 939, subd. 3.

§ 183. Violations of preceding section. A violation of the last section may be punished as a contempt; and an order made contrary thereto may be revoked by the judge or commissioner who made it, or vacated by a judge of the court in which the action or proceeding is pending. En. March 11, 1872. Am'd. 1880, 43.

Cal. Rep. Cit. 61, 194.

Penalty for violation: Post, secs. 906, 1209.

Ex parte order, vacating or modifying: Post, sec. 937.

§ 184. Proceedings not affected by vacancy in office. No proceeding in any court of justice, in an action or special proceeding pending therein, shall be affected by a vacancy in the office of all or any of the judges thereof. En. March 11, 1872. Am'd. 1880, 43.

185. Proceedings to be in English language. Every written proceeding in a court of justice in this state shall be in the English language, and judicial proceedings shall be conducted, preserved, and published in no other. En. March 11, 1872. Am'd. 1880, 43.

§ 186. Abbreviations and figures. Such abbreviations as are in common use may be used, and numbers may be expressed by figures or numerals in the customary manner. En. March 11, 1872. Am'd. 1880, 43.

Cal. Rep. Cit. 135, 29.

§ 187. Means to carry jurisdiction into effect. When jurisdiction is, by the constitution or this code, or by any other statute, conferred on a court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code. En. March 11, 1872. Am'd. 1880, 43.

Cal. Rep. Cit. 50, 542; 50, 545; 63, 507; 63, 508; 65, 192; 71, 601; 72, 320; 72, 597; 75, 166; 76, 645; 81, 615; 82, 467; 82, 468; 98, 495; 100, 120; 100, 109; 109, 255; 113, 64; 117, 202; 118, 420; 121, 41; 124, 474; 137, 203; 138, 495; 141, 553.

§ 188. En. 1873-4, 285. Rep. 1880, 21.

Code Civil Proc.—6.

PERSONS SPECIALLY INVESTED WITH POWERS OF A JUDICIAL NATURE.

Chapter I. Jurors, §§ 190-254.

II. Court Commissioners, §§ 258, 259.

CHAPTER I.

JURORS.

Article I. Jurors in General, §§ 190-195.

II. Qualifications and Exemptions of Jurors, §§ 198-202.

III. Of Selecting and Returning Jurors for Courts of Record, §§ 204-211.

IV. Of Drawing Jurors for Courts of Record, §§ 214-220.

V. Of Summoning Jurors for Courts of Record, §§ 225-228.

VI. Of Summoning Jurors for Courts not of Record, §§ 230-232.

VII. Of Summoning Jurors of Inquest, § 235.

VIII. Obedience to Summons, how Enforced, § 238.

IX. Of Impaneling Grand Juries, §§ 241-243.

X. Of Impaneling Trial Juries in Courts of Record, §§ 246, 247.

XI. Of Impaneling Trial Juries in Courts not of Record, §§ 250, 251.

XII. Of Impaneling Juries of Inquest, § 254.

ARTICLE I.

JURORS IN GENERAL.

- 190. Jury defined.
- 191. Different kinds of juries.
- 192. Grand jury defined.
- 193. Trial jury defined.
- 194. Number of a trial jury.
- 195. Jury of inquest defined.

§ 190. Jury defined. A jury is a body of men temporarily selected from the citizens of a particular district, and invested with power to present or indict a person for a public offense, or to try a question of fact. En. March 11, 1872. Am'd. 1880, 44.

Jurors, qualifications and exemptions: Post, secs. 198-202.

Selecting and summoning: Post, secs. 204, 238.

Impaneling: Post, secs. 241-254.

§ 191. Different kinds of juries. Juries are of three kinds:

1. Grand juries;

2. Trial juries;

3. Juries of inquest. En. March 11, 1872. Am'd. 1880,

44.

§ 192. Grand jury defined. A grand jury is a body of men, nineteen in number, returned in pursuance of law, from the citizens of a county, or city and county, before a court of competent jurisdiction, and sworn to inquire of public offense committed or triable within the county, or city and county. En. March 11, 1872. Am'd. 1875-6; 86; 1880, 44.

Cal. Rep. Cit. 54, 65; 54, 66; 69, 108; 92, 261; 92, 263; 119, 2.

Grand jury, impaneling: Post, secs. 241-243.

How often drawn: Const. Cal., art. 1, sec. 8.

§ 193. Trial jury defined. A trial jury is a body of men returned from the citizens of a particular district before a court or officer of competent jurisdiction, and sworn to try and determine, by verdict, a question of fact. En. March 11, 1872. Am'd. 1880, 44.

Trial by jury: Post, secs. 600-619.

Verdict, three-quarters of jury can find: Const. Cal., art. 1, sec. 7. See also, post, sec. 618.

§ 194. Number of a trial jury. A trial jury shall consist of twelve men; provided, that in civil actions and cases of misdemeanor, it may consist of twelve, or of any number less than twelve, upon which the parties may agree in open court. En. March 11, 1872. Am'd. 1880, 44.

Less than twelve: Const. Cal., art. 1, sec. 7.

§ 195. Jury of inquest defined. A jury of inquest is a body of men summoned from the citizens of a particular district before the sheriff, coroner, or other ministerial officer, to inquire of particular facts. En. March 11, 1872. Am'd. 1880, 44.

Cal. Rep. Cit. 42, 382; 42, 385.

ARTICLE II.

QUALIFICATIONS AND EXEMPTIONS OF JURORS.

- 198. Who competent to act as juror.
- 199. Who not competent to act as juror.
- 200. Who exempt from jury duty.
- 201. Who may be excused.
- 202. Affidavit of claim to exemption.

§ 198. Who competent to act as juror. A person is competent to act as juror if he be:

1. A citizen of the United States of the age of twenty-one years, who shall have been a resident of the state one year, and of the county, or city and county, ninety days before being selected and returned;

2. In possession of his natural faculties, and of ordinary intelligence, and not decrepit;

3. Possessed of sufficient knowledge of the English language;

4. Assessed on the last assessment roll of the county, or city and county, on property belonging to him. En. March 11, 1872. Am'd. 1875-6, 89; 1880, 45.

Cal. Rep. Cit. 51, 599; 58, 266; 61, 553; 106, 318; 147, 549. Subd. 4—123, 487.

Residence, generally: See Const. Cal., art. 2, sec. 4; Pol. Code, sec. 52.

§ 199. Who not competent to act as juror. A person is not competent to act as a juror:

1. Who does not possess the qualifications prescribed by the preceding section;

2. Who has been convicted of malfeasance in office or any felony or other high crime; or

3. Who has been discharged as a juror by any court of record in this state within a year, as provided in section 203 of this code, or who has been drawn as a grand juror in any such court and served as such within a year, and been discharged.

4. A person who is serving as a grand juror in any court of record in this state is not competent to act as a trial juror in any such court.

And a person who is serving as a trial juror in any court of this state is not competent to act as a grand juror in any such court. En. March 11, 1872. Am'd. 1880, 45; 1905, 70.

§200 Cal. Rep. Cit. 106, 318; 123, 487; 147, 549.

Am'd.

p. 433 § 200. Who exempt from jury duty. A person is exempt from liability to act as a juror if he be:

1. A judicial, civil, or military officer of the United States, or of this state;

2. A person holding a county, city and county, city, town or township office;

3. An attorney at law, or the clerk, secretary or stenographer of an attorney at law;

4. A minister of the gospel, or a priest of any denomination following his profession;

5. A teacher in a university, college, academy, or school;

6. A practicing physician, or druggist actually engaged in the business of dispensing medicines;

7. An officer, keeper or attendant of an almshouse, hospital, asylum, or other charitable institution;

8. Engaged in the performance of duty as officer or attendant of the state prison or of a county jail;

9. Employed on board of a vessel navigating the waters of this state;

10. An express agent, mail carrier, or a superintendent, employee, or operator of a telegraph or telephone company doing a general telegraph or telephone business in this state, or keeper of a public ferry or tollgate;

11. An active member of the National Guard of California, or an active member of a paid fire department of any city and county, city, town, or village in this state, or an exempt member of a duly organized fire company;

12. A superintendent, engineer, brakeman, motorman, or conductor on a railroad; or,

13. A person drawn as a juror in any court of record in this state, upon a regular panel, who has served as such within a year or a person drawn or summoned as a juror in any such court who has been discharged as a juror within a year as hereinafter provided. En. March 11, 1872. Am'd. 1873-4, 285; 1875-6, 86; 1880, 45; 1897, 185; 1905, 71.

Cal. Rep. Cit. Subd. 2—123, 486.

Exemption, how claimed: Post, sec. 202.

Subd. 11. Exempt fireman: Pol. Code, secs. 3337-3339.

Members of National Guard: See Pol. Code, secs. 1936, 1962.

§ 291. Who may be excused. A juror shall not be excused by a court for slight or trivial cause, or for hardship or inconvenience to his business, but only when material injury or destruction to his property, or of property intrusted to him, is threatened, or when his own health, or the sickness or death of a member of his family, requires his absence. En. March 11, 1872. Am'd. 1880, 45.

Cal. Rep. Cit. 138, 268.

§ 202. Affidavit of claim to exemption. If a person exempt from liability to act as a juror, as provided in section two hundred, be summoned as a juror, he may make and transmit his affidavit to the clerk of the court for which he is summoned, stating his office, occupation, or employment; and such affidavit shall be delivered by the clerk to the judge of the court where the name of such person is called, and if sufficient in substance, shall be received as an excuse for nonattendance in person. The affidavit shall then be filed by the clerk. En. Stats. 1873-4, 286. Am'd. 1880, 46.

ARTICLE III.

OF SELECTING AND RETURNING JURORS FOR COURTS OF RECORD.

- § 204. Jury lists, by whom and when to be made.
- 205. How selection shall be made.
- 206. Lists to contain how many names.
- 207. Repealed.
- 208. Lists to be placed with clerk.
- 209. Duty of clerk; jury boxes.
- 210. Regular jurors to serve one year.
- 211. Jurors to be drawn from boxes.

§ 204. Jury lists, by whom and when to be made. In the month of January in each year it shall be the duty of the superior court in each of the counties of this state, to make an order designating the estimated number of grand jurors, and also the number of trial jurors, that will, in the opinion of said court, be required for the transaction of the business of the court and the trial of causes therein during the ensuing year; and immediately after said order designating the estimated number of grand jurors shall be made, the court shall select and list the grand jurors required by said order to serve as grand jurors in said superior court during the ensuing year, or until new lists of jurors shall be provided, and said selections and listings shall be made of persons suitable and competent to serve as jurors, as set forth and required in sections two hundred and five and two hundred and six of this code, which list of persons so selected shall at once be placed in the possession of the county clerk; and immediately after said order designating the estimated number of trial jurors shall be made, the board of supervisors shall select, as provided in sections two hundred and five and two hundred and six of this code, a list of

persons to serve as trial jurors in the superior court of said county during the ensuing year, or until a new list of jurors shall be provided. In counties and cities and counties having a population of one hundred thousand inhabitants or over, such selection shall be made by a majority of the judges of the superior courts. En. March 11, 1872. Am'd. 1873-4, 286; 1875-6, 1880, 46; 1881, 69; 1893, 297.

Cal. Rep. Cit. 56, 37; 69, 544; 69, 549; 73, 239; 92, 242; 104, 320; 106, 319; 116, 193; 116, 194; 116, 195; 138, 269; 145, 295.

§ 205. How selection shall be made. The selections and listings shall be made of persons suitable and competent to serve as jurors, who are assessed on the last preceding assessment roll of such county or city and county, and in making such selections they shall take the names of such only as are not exempt from serving, who are in the possession of their natural faculties, and not infirm or decrepit, of fair character and approved integrity, and of sound judgment. En. March 11, 1872. Am'd. 1880, 46; 1881, 70; 1893, 298.

Cal. Rep. Cit. 95, 426; 116, 194; 145, 295.

§ 206. Lists to contain how many names. The lists of jurors, to be made as provided in the preceding section, shall contain the number of persons which shall have been designated by the court in its order. The names for such lists shall be selected from the different wards or townships of the respective counties, in proportion to the number of inhabitants therein, as nearly as the same can be estimated by the persons making said lists; and said lists shall be kept separate and distinct one from the other. En. March 11, 1872. Am'd. 1875-6, 87; 1880, 46; 1881, 70.

Cal. Rep. Cit. 56, 37; 121, 3; 131, 252; 138, 269; 145, 295; 145, 297.

§ 207. Repealed. En. March 11, 1872. Rep. 1875-6, 87.

§ 208. Lists to be placed with clerk. A certified list of the persons selected to serve as trial jurors shall at once be placed in the possession of and filed with the clerk of the superior court. En. March 11, 1872. Am'd. 1880, 46; 1881, 70; 1893, 298.

Cal. Rep. Cit. 56, 37; 108, 12.

§ 209. Duty of clerk; jury boxes. On receiving such lists, the county clerk shall file the same in his office, and write down the names contained thereon on separate pieces of paper, of the same size and appearance, and fold each piece so as to conceal the name thereon. He shall deposit the pieces of paper having on them the names of the persons selected to serve as grand jurors in a box, to be called the "grand jury box," and those having on them the names of the persons selected to serve as trial jurors, in a box to be called the "trial jury box." En. March 11, 1872. Am'd. 1875-6; 1880, 47; 1881, 70.

Cal. Rep. Cit. 56, 38; 116, 193.

§ 210. Regular jurors to serve one year. The persons whose names are so returned shall be known as regular jurors, and shall serve for one year, and until other persons are selected and returned. En. March 11, 1872. Am'd. 1880, 47.

Cal. Rep. Cit. 69, 549; 73, 239; 106, 319; 138, 269.

§ 211. Jurors to be drawn from boxes. The names of persons drawn for grand jurors shall be drawn from the "grand jury box," and the names of persons for trial jurors shall be drawn from the "trial jury box"; and if, at the end of the year, there shall be the names of persons in either of the said jury boxes who may not have been drawn during the year to serve, and have not served as jurors, the names of such persons may be placed on the list of jurors drawn for the succeeding year. En. March 1875-6, 87. Am'd. 1880, 47; 1881, 70.

Cal. Rep. Cit. 56, 38; 69, 544; 104, 320; 106, 319; 131, 252.

ARTICLE IV.

OF DRAWING JURORS FOR COURTS OF RECORD.

- § 214. Order of judge or judges for drawing of jury.
- 215. Sheriff to be notified.
- 216. No section.
- 217. No section.
- 218. No section.
- 219. Drawing, how conducted.
- 220. Preservation of ballots drawn.
- 221. No section.

§ 214. Order of judge or judges for drawing of jury. Whenever the business of the superior court shall require

the attendance of a trial jury for the trial of criminal cases, or where a trial jury shall have been demanded in any cause or causes at issue in said court, and no jury is in attendance, the court may make an order directing a trial jury to be drawn, and summoned to attend before said court. Such order shall specify the number of jurors to be drawn, and the time at which the jurors are required to attend. And the court may direct that such causes, either criminal or civil, in which a jury may be required, or in which a jury may have been demanded, be continued and fixed for trial when a jury shall be in attendance. En. March 11, 1872. Am'd. 1873-4, 287; 1875-6, 88; 1880, 47.

Cal. Rep. Cit. 57, 124; 65, 78; 97, 176; 138, 269; 139, 64.

Summoning jury. See sec. 226, post.

§ 215. Sheriff to be notified. Immediately upon the order mentioned in the preceding section being made, the clerk shall, in the presence of the court, proceed to draw the jurors from the "trial jury box." En. March 11, 1872. Am'd. 1873-4, 287; 1880, 47; 1881, 71.

Cal. Rep. Cit. 55, 463; 65, 78.

§ 216. En. March 11, 1872. Rep. 1880, 21.

§ 217. En. March 11, 1872. Am'd. 1873-4, 287. Rep. 1880, 21.

§ 218. En. March 11, 1872. Rep. 1880, 21.

§ 219. Drawing, how conducted. The clerk must conduct said drawing as follows:

1. He must shake the box containing the names of the trial jurors, so as to mix the slips of paper upon which such names are written, as well as possible; he must then draw from said box as many slips of paper as are ordered by the court.

2. A minute of the drawing shall be entered in the minutes of the court, which must show the name on each slip of paper so drawn from said jury box.

3. If the name of any person is drawn from said box who is deceased or insane, or who may have permanently removed from the county, or who is exempt from jury service, and the fact shall be made to appear to the satisfaction of the court, the name of such person shall be

omitted from the list, and the slip of paper having such name on it shall be destroyed, and another juror drawn in his place, and the fact shall be entered upon the minutes of the court. The same proceeding shall be had as often as may be necessary, until the whole number of jurors required be drawn. After the drawing shall be completed, the clerk shall make a copy of the list of names of the persons so drawn, and certify the same. In his certificate he shall state the date of the order and of the drawing, and the number of the jurors drawn, and the time when and the place where such jurors are required to appear. Such certificate and list shall be delivered to the sheriff for service. En. March 11, 1872. Am'd. 1880, 47; 1881, 71.

Cal. Rep. Cit. 57, 124; 69, 109; 92, 242.

§ 220. Preservation of ballots drawn. After a drawing of persons to serve as jurors, the clerk shall preserve the ballots drawn, and at the close of the session or sessions for which the drawing was had, he shall replace in the proper box from which they were taken all ballots which have on them the names of persons, who did not serve as jurors for the session or sessions aforesaid, and who are not exempt or incompetent. En. March 11, 1872. Am'd. 1875-6, 88; 1880, 48.

§ 221. En. March 11, 1872. Rep. 1880, 21.

ARTICLE V.

OF SUMMONING JURORS FOR COURTS OF RECORD.

- 225. Sheriff to summon jurors, how.
- 226. Of drawing and summoning jurors to attend forthwith.
- 227. Of summoning jurors to complete a panel.
- 228. Compensation of elisor.

§ 225. Sheriff to summon jurors, how. The sheriff, as soon as he receives the list or lists of jurors drawn, shall summon the persons named therein to attend the court at the opening of the regular session thereof, or at such session or time as the court may order, by giving personal notice to that effect to each of them, or by leaving a written notice to that effect at his place of residence, with some person of proper age, and shall return the list to the court,

at the opening of the regular session thereof, or at such session, or time as the jurors may be ordered to attend, specifying the names of those who were summoned, and the manner in which each person was notified. En. March 11, 1872. Am'd. 1880, 48.

§ 226. Of drawing and summoning jurors to attend forthwith. Whenever jurors are not drawn or summoned to attend any court of record or session thereof, or a sufficient number of jurors fail to appear, such court may order a sufficient number to be forthwith drawn and summoned to attend the court, or it may, by an order entered in its minutes, direct the sheriff, or an elisor chosen by the court, forthwith to summon so many good and lawful men of the county, or city and county, to serve as jurors, as may be required, and in either case such jurors must be summoned in the manner provided in the preceding section. En. March 11, 1872. Am'd. 1873-4, 288; 1880, 48.

Cal. Rep. Cit. 47, 95; 47, 136; 54, 401; 59, 363; 65, 151; 69, 111; 92, 243; 92, 246; 92, 258; 92, 272; 95, 427; 106, 318; 116, 195; 116, 508; 122, 237; 134, 438; 139, 64; 142, 360.

§ 227. Of summoning jurors to complete a panel. When there are not competent jurors enough present to form a panel the court may direct the sheriff, or an elisor chosen by the court, to summon a sufficient number of persons having the qualifications of jurors to complete the panel, from the body of the county, or city and county, and not from the bystanders; and the sheriff or elisor shall summon the number so ordered accordingly and return the names to the court. En. March 11, 1872. Am'd. 1873-4, 288; 1880, 48.

Cal. Rep. Cit. 59, 363; 106, 318; 113, 85; 116, 195; 138, 269; 142, 360.

Prac. Act, sec. 589. En. April 29, 1851.

§ 228. Compensation of elisor. An elisor who shall, by order of a court of record, summon persons to serve as jurors, shall be entitled to a reasonable compensation for his services, which must be fixed by the court and paid out of the county or city and county treasury, and out of the general fund thereof. En. Stats. 1875-6, 88. Am'd. 1880, 49.

ARTICLE VI.

OF SUMMONING JURORS FOR COURTS NOT OF RECORD.

§ 230. Jurors for justices' or police courts.

231. How to be summoned.

232. Officer's return.

230 m'd. 434 § 230. Jurors for justices' or police courts. When jurors are required in any of the justices' courts, or in any police or other inferior court, they shall, upon the order of the justice, or any one of the justices where there is more than one, or if [of] the judge thereof, be summoned by the sheriff, constable, marshal, or policeman of the jurisdiction. En. March 11, 1872. Am'd. 1880, 49.

Cal. Rep. Cit. 145, 475.

§ 231. How to be summoned. Such jurors must be summoned from the persons competent to serve as jurors, residents of the city and county, township, city, or town in which such court has jurisdiction, by notifying them orally that they are summoned, and of the time and place at which their attendance is required. En. March 11, 1872. Am'd. 1880, 49.

§ 232. Officer's return. The officer summoning such jurors shall, at the time fixed in the order, for their appearance, return it to the court with a list of the persons summoned indorsed thereon. En. March 11, 1872, Am'd. 1880, 49.

ARTICLE VII.

OF SUMMONING JURIES OF INQUEST.

§ 235. How to be summoned.

§ 235. How to be summoned. Juries of inquest shall be summoned by the officer before whom the proceedings in which they are to sit are to be had, or by any sheriff, constable, or policeman, from the persons competent to serve as jurors, resident of the county, or city and county, by notifying them orally that they are so summoned, and of the time and place at which their attendance is required. En. March 11, 1872. Am'd. 1880, 49.

ARTICLE VIII.

OBEDIENCE TO SUMMONS, HOW ENFORCED.

§ 238. Attachment and fine.

§ 238. Attachment and fine. Any juror summoned, who willfully and without reasonable excuse fails to attend, may be attached and compelled to attend; and the court may also impose a fine not exceeding fifty dollars, upon which execution may issue. If the juror has not personally served, the fine must not be imposed until upon an order to show cause an opportunity has been offered the juror to be heard. En. March 11, 1872. Am'd. 1880, 49.

ARTICLE IX.

OF IMPANELING GRAND JURIES.

- § 241. Grand juries, when and by whom impaneled.
- § 242. How constituted.
- § 243. Manner of impaneling prescribed in Penal Code.

§ 241. Grand juries, when and by whom impaneled. Every superior court, whenever in the opinion of the court the public interest requires it, must make and file with the county clerk, an order directing a jury to be drawn, and designate the number, which, in case of a grand jury, shall not be less than twenty-five nor more than thirty. In all counties there shall be at least one grand jury drawn and impaneled in each year. Such order must designate the time at which the drawing will take place. The names of such jurors shall be drawn, the list of names certified and summoned, as provided for drawing and summoning trial jurors; and the names of any persons drawn, who may not be impaneled upon the grand jury, may be again placed in the grand jury box. En. March 11, 1872. Am'd. 1880, 50; 1881, 71; 1905, 139.

Cal. Rep. Cit. 47, 136; 69, 109; 69, 546; 69, 549; 92, 242.

Summoning grand jury: Const. Cal., art. 1, sec. 8.

§ 242. How constituted. When, of the persons summoned as grand jurors and not excused, nineteen are present, they shall constitute the grand jury. If more than nineteen of such persons are present, the clerk shall write their names on separate ballots, which he must fold so that the names cannot be seen, place them in a box, and draw out nineteen of them, and the persons whose names are on the ballots so drawn shall constitute the grand jury. If less than nineteen of such persons are present, the panel may be filled as provided in section two hundred and twenty-six of this code. And whenever, of the persons summoned to complete a grand jury, more shall attend than are required, the requisite number shall be obtained by writing the names of those summoned and not excused on ballots, depositing them in a box, and drawing as above provided. En. March 11, 1872. Am'd. 1875-6, 88; 1880, 50.

§ 243. Manner of impaneling prescribed in Penal Code. Thereafter such proceedings shall be had in impaneling the grand jury as are prescribed in part two of the Penal Code. En. March 11, 1872. Am'd. 1880, 50.

Cal. Rep. Cit. 54, 66; 69, 111; 92, 258; 106, 316; 106, 318; 134, 437.

Formation of grand jury: See Pen. Code, secs. 894-901.

ARTICLE X.

OF IMPANELING TRIAL JURIES IN COURTS OF RECORD.

§ 246. Clerk to call list of jurors summoned.

§ 247. Manner of impaneling prescribed in part two.

§ 246. Clerk to call list of jurors summoned. At the opening of court on the day trial jurors have been summoned to appear, the clerk shall call the names of those summoned, and the court may then hear the excuses of jurors summoned. The clerk shall then write the names of the jurors present and not excused on separate slips or ballots of paper, and fold such slips so that the names are concealed, and there, in the presence of the court, deposit the slips or ballots in a box, which must be kept sealed or locked until ordered by the court to be opened. En. March 11, 1872. Am'd. 1880, 50.

Cal. Rep. Cit. 101, 544.

§ 247. Manner of impaneling prescribed in part two. Whenever thereafter a civil action is called by the court for trial, and a jury is required, such proceedings shall be had in impaneling the trial jury as are prescribed in part two of this code. If the action be a criminal one, the jury shall be impaneled as prescribed in the Penal Code. En. March 11, 1872. Am'd. 1880, 51.

Formation of jury in civil action: See post, secs. 600-604.

Criminal case: See Pen. Code, secs. 1055-1089.

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Enact.
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ARTICLE XI.

OF IMPANELING TRIAL JURIES IN COURTS NOT OF RECORD.

§ 250. Proceedings in forming jury.

§ 251. Manner of impaneling.

§ 250. Proceedings in forming jury. At the time appointed for a jury trial in justices', police or other inferior courts, the list of jurors summoned must be called, and the names of those attending and not excused must be written upon separate slips of paper, folded so as to conceal the names, and placed in a box, from which the trial jury must be drawn. En. March 11, 1872. Am'd. 1880, 51.

Prac. Act, sec. 588. En. April 29, 1851.

§ 251. Manner of impaneling. Thereafter, if the action is a criminal one, the jury must be impaneled as provided in the Penal Code; if a civil one as provided in part two of this code. En. March 11, 1872. Am'd. 1880, 51.

Similar provision: See ante, sec. 247.

ARTICLE XII.

OF IMPANELING JURIES OF INQUEST.

§ 254. Manner of impaneling.

§ 254. Manner of impaneling. The manner of impaneling juries of inquest is prescribed in the provisions of the different codes relating to such inquests. En. March 11, 1872. Am'd. 1880, 51.

Cal. Rep. Cit. 43, 86; 43, 173.

CHAPTER II.

COURT COMMISSIONERS.

§ 258. Appointment and qualifications.

§ 259. Powers of court commissioners.

§ 258. Appointment and qualifications. The superior court of every city and county in the state may appoint six commissioners, to be designated each as "court commissioner" of such city and county; and the superior court of every other county in the state may appoint one commissioner, to be designated as "court commissioner" of such county. Such commissioners shall be citizens of the United States, and residents of the city and county, or county, in which they are appointed, and hold offices during the pleasure of the courts appointing them. En. March 11, 1872. Am'd. 1880, 51.

Court commissioners: See Const. Cal., art. 6, sec. 14.

§ 259. Powers of court commissioners. Every court commissioner shall have power:

1. To hear and determine ex parte motions for orders and writs, except orders or writs of injunction in the superior court of the county, or city and county, for which he is appointed; provided, that he shall have power to hear and determine such motions only in the absence or inability to act of the judge or judges of the superior court of the county, or city and county;

2. To take proof and report his conclusions thereon as to any matter of fact other than an issue of fact raised by the pleadings, upon which information is required by the court; but any party to the proceedings may except to such report within five days after written notice that the same has been filed, and may argue his exceptions before the court on giving notice of motion for that purpose;

3. To take and approve bonds and undertakings whenever the same may be required in actions or proceedings in such superior courts, and to examine the sureties thereon when an exception has been taken to their sufficiency, and to administer oaths and affirmations, and take affidavits and depositions in any action or proceeding in any of the courts of this state, or in any matter or pro-

ceeding whatever, and to take acknowledgments and proof of deeds, mortgages, and other instruments requiring proof or acknowledgment for any purpose under the laws of this state;

4. To charge and collect the same fees for the performance of official acts as are now or may hereafter be allowed by law to notaries public in this state for like services; provided, that this subdivision shall not apply to any services of such commissioner, the compensation for which is expressly fixed by law;

5. To provide an official seal, upon which must be engraved the words "court commissioner" and the name of the county, or city and county, in which said commissioner resides;

6. To authenticate with his official seal his official acts. En. March 11, 1872. Am'd. 1877-8, 98; 1880, 51.

Cal. Rep. Cit. 56, 465; 56, 627; 104, 682; 123, 99; 123, 100; 128, 420; 130, 447.

Judicial powers, persons having, order enforced before: Ante, sec. 128, subd. 2.

References and trials by referees: See post, secs. 638 et seq.

Subd. 4. Fees of notaries public: See Pol. Code, sec. 798.

Justices of the peace and court commissioners are the only judicial officers who are authorized to receive fees: Const. Cal., art. 6, sec. 15.

Subd. 5. Official seals defined: See ante, sec. 14.

Code Civil Proc.—7.

TITLE IV.

MINISTERIAL OFFICERS OF COURTS OF JUSTICE.

Chapter I. Of Ministerial Officers Generally, § 262.

II. Secretaries and Bailiffs of the Supreme Court, §§ 265, 266.

III. Phonographic Reporters, §§ 268-274.

CHAPTER I.

OF MINISTERIAL OFFICERS GENERALLY.

§ 262. Election, powers, and duties, where prescribed.

§ 262. Election, powers, and duties, where prescribed. The modes and times of election, terms, powers, and duties of the attorney general, clerk of the supreme court, reporter of the decisions of the supreme court, clerks, sheriffs, and coroners, are prescribed in the Political and Penal Codes. En. March 11, 1872. Am'd. 1880, 52.

Attorney general: See Pol. Code, secs. 470 et seq.

Clerk of supreme court: Pol. Code, secs. 749 et seq.

Reporter of supreme court decisions: Pol. Code, secs. 771 et seq.

County clerks: Pol. Code, secs. 4204 et seq.

Sheriffs: Pol. Code, sec. 4176; Pen. Code, secs. 1216 et seq.; 1601 et seq.

Coroners: Pol. Code, secs. 4285 et seq.; Pen. Code, sec. 1510.

CHAPTER II.

SECRETARIES AND BAILIFFS OF THE SUPREME COURT.

§ 265. Appointment.

§ 266. Tenure of office, and duties.

§.265. Appointment. The justices of the supreme court may appoint two secretaries and two bailiffs, who shall be citizens of the United States and of this state. En. March 11, 1872. Am'd. 1880, 53.

§ 266. Tenure of office, and duties. The secretaries and bailiffs shall hold their offices at the pleasure of the justices, and shall perform such duties as may be required of them by the court or any justice thereof. En. March 11, 1872. Am'd. 1880, 53.

Cal. Rep. Cit. 83, 118.

CHAPTER III.

PHONOGRAPHIC REPORTERS.

- § 268. Phonographic reporters for supreme court, where provided for.
- § 269. Phonographic reporters for superior courts, their appointment, and duties.
- § 270. Qualifications and test of competency.
- § 271. Attention to duties, reporters pro tempore.
- § 272. Oath of office.
- § 273. Reports prima facie correct statements.
- § 274. Compensation.

Gen. Cit. to Chap.—Cal. Rep. Cit. 127, 426.

§ 268. Phonographic reporters for supreme court, where provided for. Phonographic reporters for the supreme court are provided for in part three of the Political Code. En. Stats. 1880, 53.

Cal. Rep. Cit. 127, 160.

Phonographic reporters: See Pol. Code, sec. 739 as to salary; sec. 769 as to appointment; and sec. 770 as to duty of phonographic reporter of supreme court.

§ 269. Phonographic reporters for superior courts, their appointment, and duties.. The judge or judges of any superior court in the state may appoint a competent phonographic reporter, or as many such reporters as there are judges, to be known as official reporter or reporters of such court, and to hold office during the pleasure of the judge or judges appointing them. Such reporter, or any one of them, where there are two or more, must, at the request of either party, or of the court in a civil action or proceeding, and on the order of the court, the district attorney, or the attorney for defendant in a criminal action or proceeding, take down in shorthand all the testimony, the objections made, the rulings of the court, the exceptions taken, all arraignments, pleas and sentences of defendants in criminal cases, the arguments of the prosecuting at-

torney to the jury, and all statements and remarks made and oral instructions given by the judge; and if directed by the court, or requested by either party, must, within such reasonable time after the trial of such case as the court may designate, write out the same, or such specific portions thereof as may be requested, in plain and legible longhand, or by typewriter, or other printing machine, and certify to the same as being correctly reported and transcribed, and when directed by the court, file the same with the clerk of the court. En. March 11, 1872. Am'd. 1873-4, 288; 1880, 53; 1903, 234.

Cal. Rep. Cit. 49, 354; 64, 234; 64, 237; 127, 426; 145, 39; 145, 40.

§ 270. **Qualifications and test of competency.** No person shall be appointed to the position of official reporter of any court in this state, except upon satisfactory evidence of good moral character, and without being first examined as to his competency by at least three members of the bar practicing in said court, such members to be designated by the judge or judges of said court. The committee of members of the bar so designated shall, upon the request of the judge or judges of said court, examine any person as to his qualifications whom said judge or judges may wish to appoint as official reporter; and no person shall be appointed to such position upon whose qualifications such committee shall not have reported favorably. The test of competency before such committee shall be as follows: The party examined must write in the presence of said committee at the rate of at least one hundred and fifty words per minute, for five consecutive minutes, upon matter not previously written by or known to him, immediately read the same back to the committee, and transcribe the same into longhand writing, plainly and with accuracy. If he pass such test satisfactorily, the committee shall furnish him with a written certificate of that fact, signed by at least a majority of the members of the committee, which certificate shall be filed among the records of the court. En. March 11, 1872. Am'd. 1873-4, 400; 1880, 53.

Cal. Rep. Cit. 49, 354; 64, 234; 64, 237; 127, 426; 142, 144.

§ 271. **Attention to duties, reporters pro tempore.** The official reporter of any superior court shall attend to the duties of his office in person, except when excused for

good and sufficient reason by order of the court, which order shall be entered upon the minutes of the court. Employment in his professional capacity elsewhere shall not be deemed a good and sufficient reason for such excuse. When the official reporter of any court has been excused in the manner provided in this section, the court may appoint an official reporter pro tempore, who shall perform the same duties and receive the same compensation during the term of his employment as the official reporter. En. March 11, 1872. Am'd. 1873-4, 400; 1880, 54.

Cal. Rep. Cit. 49, 354; 64, 234; 64, 237.

§ 272. Oath of office. The official reporter of any court, or official reporter pro tempore, shall, before entering upon the duties of his office, take and subscribe the constitutional oath of office. En. Stats. 1873-4, 401. Am'd. 1880, 54.

Cal. Rep. Cit. 49, 354; 57, 652; 64, 238.

§ 273. Reports prima facie correct statements. The report of the official reporter, or official reporter pro tempore, of any court, duly appointed and sworn, when transcribed and certified as being a correct transcript of the testimony and proceedings in the case, is prima facie evidence of such testimony and proceedings. En. Stats. 1873-4, 402. Am'd. 1880, 54; 1903, 234.

Cal. Rep. Cit. 49, 354; 57, 652; 73, 208; 73, 209; 75, 303; 76, 283; 131, 480.

§ 274. Compensation. For his services, the official reporter shall receive the following fees, except in counties where a statute provides otherwise:

For reporting testimony and proceedings, ten dollars per day, which amount, when more than one case is reported in one day, must be apportioned by the court between the several cases.

For transcription, for one copy, twenty cents per hundred words; for two copies made at one time, fifteen cents each per hundred words; for three copies made at one time, eleven cents each per hundred words; for four copies made at one time, nine cents each per hundred words; and for five or more copies made at one time, eight cents each per hundred words.

In criminal cases, the fees for reporting and for transcripts ordered by the court to be made must be paid out of

the county treasury upon the order of the court; provided, that when there is no official reporter in attendance, and a reporter pro tempore is appointed, his reasonable expenses for traveling and detention must be fixed and allowed by the court and paid in like manner.

In civil cases, the fees for reporting and for transcripts ordered by the court to be made must be paid by the parties in equal proportions, and either party may, at his option, pay the whole thereof; and, in either case, all amounts so paid by the party to whom costs are awarded must be taxed as costs in the case. The fees for transcripts and copies ordered by the parties must be paid by the party ordering the same. No reporter must be required to perform any service in a civil case until his fees therefor have been paid to him or deposited with the clerk of the court. En. Stats. 1873-4, 403. Am'd. 1880, 54; 1885, 218; 1903, 234.

Cal. Rep. Cit. 49, 354; 57, 652; 59, 583; 64, 237; 64, 243; 68, 195; 68, 198; 68, 200; 83, 363; 83 364; 83, 365; 86, 494; 93, 514; 93, 515; 120, 128; 124, 388; 124, 647; 127, 156; 127, 158; 127, 159; 127, 160; 127, 161; 127, 162; 135, 651; 145, 40; 145, 608.

TITLE V.

PERSONS SPECIALLY INVESTED WITH MINISTERIAL
POWERS RELATING TO COURTS OF JUSTICE.

Chapter I. Attorneys and Counselors at Law, §§ 275-299.

II. Other Persons Invested with Such Powers, §
304.

CHAPTER I.

ATTORNEYS AND COUNSELORS AT LAW.

- 275. Who may be admitted as attorneys.
- 276. Qualifications.
- 277. Certificate of admission and license.
- 278. Oath.
- 279. Attorneys of other states.
- 280. Roll of attorneys.
- 280a. Effect of diploma from Hastings College of Law.
- 281. Penalty for practicing without license.
- 282. Duties.
- 283. Authority.
- 284. Change of attorney.
- 285. Notice of change.
- 286. Death or removal of attorney.
- 287. Removal and suspension.
- 288. Conviction of felony.
- 289. Proceedings for removal or suspension.
- 290. Accusation.
- 291. Verification.
- 292. Citation.
- 293. Appearance.
- 294. Objections to accusation.
- 295. Demurrer.
- 296. Answer.
- 297. Trial.
- 298. Reference to take depositions.
- 299. Judgment.

§ 275. Who may be admitted as attorneys. Any citizen or person resident of this state, who has bona fide declared his or her intention to become a citizen in the manner required by law, of the age of twenty-one years, of good moral character, and who possesses the necessary qualifications of learning and ability, is entitled to admission as attorney and counselor in all the courts of this state. All persons are attorneys of the supreme court who were on the first day of January, eighteen hundred and eighty, entitled to practice in the court superseded thereby. En. March 11, 1872. Am'd. 1877-8, 99; 1880, 55.

Cal. Rep. Cit. 86, 85.

Admission of attorneys: See sections following this.

Judges must be licensed attorneys: Ante, secs. 156, 157.

Judicial and ministerial officers, not to practice: See Pol. Code, sec. 4121; sec. 171, ante; nor to have a partner: Sec. 172, ante.

Removal of attorneys: See post, sec. 287.

§ 276. **Qualifications.** Every applicant for admission as an attorney and counselor must produce satisfactory testimonials of a good moral character and undergo a strict examination in open court as to his qualifications by the justices of one of the district courts of appeal. En. March 11, 1872. Am'd. 1873-4, 289; 1873-4, 404; 1880, 55; 1895, 56; 1905, 5.

Cal. Rep. Cit. 86, 85; 126, 87.

Examination of candidates. See supreme court rule 1.

§ 277. **Certificate of admission and license.** If, upon examination, he is found qualified, the district court of appeal, before which he is examined, shall admit him as an attorney and counselor in all the courts of this state, and shall direct an order to be entered to that effect upon its records, and that a certificate of such record be given to him by the clerk of the court, which certificate shall be his license. Every person admitted to practice by a district court of appeal, either upon examination, or upon the production of a license from another state, as provided in section 279 of this code, may practice as an attorney in all of the courts of this state, including the supreme court; and every person now entitled to practice in the supreme court of this state may practice as an attorney in any district court of appeal. En. March 11, 1872. Am'd. 1880, 56; 1905, 5.

Cal. Rep. Cit. 86, 86; 146, 378.

Disbarment: See post, secs. 287 et seq.

§ 278. **Oath.** Every person, on his admission, must take an oath to support the constitution of the United States and the constitution of the state of California, and to faithfully discharge the duties of an attorney and counselor at law to the best of his knowledge and ability. A certificate of such oath must be indorsed upon the license. En. March 11, 1872. Am'd. 1880, 56.

Cal. Rep. Cit. 69, 34; 75, 92; 86, 86.

Duties: See post, sec. 282.

§ 279. **Attorneys of other states.** Every citizen of the United States, or person resident of this state, who has, bona fide declared his intention to become a citizen in the manner required by law, who has been admitted to practice law in the highest court of a sister state, or of a foreign country, where the common law of England constitutes the basis of jurisprudence, may be admitted to practice in all the courts of this state, by any district court of appeal, upon the production of his or her license, and satisfactory evidence of good moral character; but the court may examine the applicant as to his or her qualifications. En. March 11, 1872. Am'd. 1877-8, 99; 1880, 56; 1905, 6.

Cal. Rep. Cit. 61, 123; 61, 124; 84, 165; 146, 378.

"State" and "United States," defined: Ante, sec. 17, subd. 7.

§ 280. **Roll of attorneys.** Every clerk of a district court of appeal shall keep a roll of attorneys and counselors admitted to practice by the court of which he is clerk, which roll must be signed by the person admitted before he receives his license. Every clerk shall, each month, certify to the clerk of the supreme court a list of the persons so admitted during the preceding month, with such other information as appears in regard thereto on his roll, and the clerk of the supreme court shall keep a general roll of all the attorneys admitted to practice. En. March 11, 1872. Am'd. 1880, 56; 1905, 6.

Cal. Rep. Cit. 86, 86.

Attorneys of the supreme court: Ante, sec. 275.

§ 280a. **Effect of diploma granted by Hastings College of the law.** Nothing in this chapter contained shall be construed as a repeal or modification of any existing provision of law relative to the effect of a diploma granted by the Hastings College of the Law. En. Stats. 1905, 6.

§ 281. **Penalty for practicing without license.** If any person shall practice law in any court, except a justice's court or police court, without having received a license as attorney and counselor, he shall be guilty of a contempt of court. En. March 11, 1872. Am'd. 1880, 56.

Cal. Rep. Cit. 86, 86.

Contempt: Post, secs. 1209 et seq.

Justices' court practitioners: Ante, sec. 96.

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§ 282. Duties. It is the duty of an attorney and counselor:

1. To support the constitution and laws of the United States and of this state;

2. To maintain the respect due to the courts of justice and judicial officers;

3. To counsel or maintain such actions, proceedings, or defenses only as appear to him legal or just, except the defense of a person charged with a public offense;

4. To employ, for the purpose of maintaining the causes confided to him, such means only as are consistent with truth, and never seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law;

5. To maintain inviolate the confidence, and at every peril to himself, to preserve the secrets of his client;

6. To abstain from all offensive personality, and to advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he is charged;

7. Not to encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest;

8. Never to reject, for any consideration personal to himself, the cause of the defenseless or the oppressed. En. March 11, 1872. Am'd. 1880, 56.

Cal. Rep. Cit. 64, 437; 69, 35; 86, 86; 130, 123; 147, 19. Subd. 1—69, 34. Subd. 2—64, 598; 75, 92; 84, 81; 86, 86; 105, 480. Subd. 3—130, 123. Subd. 4—64, 598; 67, 645; 71, 373; 130, 123. Subd. 5—69, 34. Subd. 6—105, 477. Subd. 7—84, 82.

Subd. 1. Oath: Ante, sec. 278.

Subd. 3. Offender, public—defense of: See Pen. Code, sec. 987.

Subd. 5. Privileged communications: See post, sec. 1881.

§ 283. Authority. An attorney and counselor shall have authority:

1. To bind his client in any of the steps of an action or proceeding by his agreement filed with the clerk, or entered upon the minutes of the court, and not otherwise;

2. To receive money claimed by his client in an action or proceeding during the pendency thereof, or after judgment, unless a revocation of his authority is filed, and upon the payment thereof, and not otherwise, to dis-

charge the claim or acknowledge satisfaction of the judgment. En. March 11, 1872. Am'd. 1886, 57.

Cal. Rep. Cit. 52, 240; 53, 29; 53, 664; 59, 479; 63, 92; 86, 86; 91, 491; 116, 492; 129, 200; 129, 689; 130, 42; 130, 406; 143, 496. Subd. 1—52, 246; 62, 491; 71, 465; 91, 490; 95, 287; 111, 277; 112, 609; 116, 491; 117, 35; 129, 200; 130, 42; 130, 406; 135, 201. Subd. 2—53, 29.

§ 284. **Change of attorney.** The attorney in an action or special proceeding may be changed at any time before or after judgment or final determination, as follows:

1. Upon consent of both client and attorney, filed with the clerk, or entered upon the minutes;

2. Upon the order of the court, upon the application of either client or attorney, after notice from one to the other. En. March 11, 1872. Am'd. 1873-4, 289; 1880, 57.

Cal. Rep. Cit. 53, 222; 56, 372; 62, 491; 65, 193; 112, 355; 118, 590; 142, 528. Subd. 2—115, 88; 121, 166; 136, 172.

Notice of substitution: See next section.

§ 285. **Notice of change.** When an attorney is changed, as provided in the last section, written notice of the change and of the substitution of a new attorney, or of the appearance of the party in person, must be given to the adverse party. Until then he must recognize the former attorney. En. March 11, 1872. Am'd. 1880, 57.

Cal. Rep. Cit. 53, 222; 56, 372; 56, 490; 62, 491; 65, 193; 118, 590; 119, 108.

§ 286. **Death or removal of attorney.** When an attorney dies, or is removed or suspended, or ceases to act as such, a party to an action, for whom he was acting as attorney, must before any further proceedings are had against him, be required by the adverse party, by written notice, to appoint another attorney or to appear in person. En. March 11, 1872. Am'd. 1880, 57.

Cal. Rep. Cit. 130, 289. Subd. 1—107, 82. Subd. 2—107, 82.

§ 287. **Removal and suspension.** An attorney and counselor may be removed or suspended by the supreme court, or any department thereof, or by any superior court of the state, for either of the following causes, arising after his admission to practice;

1. His conviction of a felony or misdemeanor involving moral turpitude, in which case the record of conviction shall be conclusive evidence;

2. Willful disobedience or violation of an order of the court requiring him to do or forbear an act connected with, or in the course of his profession, which he ought in good faith to do or forbear, and any violation of the oath taken by him, or of his duties as such attorney and counselor;

3. Corruptly or willfully and without authority appearing as attorney for a party to an action or proceeding;

4. Lending his name to be used as attorney and counselor by another person who is not an attorney and counselor.

In all cases where an attorney is removed or suspended by a superior court the judgment or order of removal or suspension may be reviewed on appeal by the supreme court. En. March 11, 1872. Am'd. 1873-4, 289; 1880, 57.

Cal. Rep. Cit. 61, 123; 61, 127; 61, 130; 67, 358; 69, 34; 69, 59; 78, 308; 86, 87; 107, 82; 107, 83; 114, 368; 123, 523; 146, 600; 147, 12; 147, 14. Subd. 2—64, 598. Subd. 4—36, 86.

Attorney has right to make a defense: See post, secs. 292 et seq.

Attorney defending prosecution instituted by himself or partner forfeits license: See Pen. Code, sec. 162.

§ 288. Conviction of felony. In case of the conviction of an attorney or counselor of a felony or misdemeanor, involving moral turpitude, the clerk of the court in which such conviction is had shall, within thirty days thereafter, transmit to the supreme court a certified copy of the record of conviction. En. March 11, 1872. Am'd. 1880, 57.

Cal. Rep. Cit. 66, 400; 123, 523.

§ 289. Proceedings for removal or suspension. The proceedings to remove or suspend an attorney and counselor, under the first subdivision of section two hundred and eighty-seven must be taken by the court on the receipt of a certified copy of the record of conviction. The proceedings under the second, third, or fourth subdivisions of section two hundred and eighty-seven may be taken by the court for the matters within its knowledge, or may be taken upon the information of another. En. March 1, 1872. Am'd. 1880, 58.

§ 290. **Accusation.** If the proceedings are upon the information of another, the accusations must be in writing. En. March 11, 1872. Am'd. 1880, 58.

Cal. Rep. Cit. 58, 41; 102, 467.

§ 291. **Verification.** The accusation must state the matters charged and be verified by the oath of some person to the effect that the charges therein contained are true. En. March 11, 1872. Am'd. 1880, 58.

Cal. Rep. Cit. 58, 40; 58, 41; 102, 467; 147, 9; 147, 10.

§ 292. **Citation.** Upon receiving the accusation, the court shall make an order requiring the accused to appear and answer it at a specified time, and shall cause a copy of the order and of the accusation to be served upon the accused at least five days before the day appointed in the order. En. March 11, 1872. Am'd. 1880, 58.

§ 293. **Appearance.** The accused must appear at the time appointed in the order and answer the accusation, unless for sufficient cause the court assign another day for that purpose. If he do not appear, the court may proceed and determine the accusation in his absence. En. March 11, 1872. Am'd. 1880, 58.

§ 294. **Objections to accusation.** The accused may answer to the accusation either by objecting to its sufficiency or denying it. En. March 11, 1872. Am'd. 1880, 58.

§ 295. **Demurrer.** If he object to the sufficiency of the accusation, the objection must be in writing, but need not be in any specific form, it being sufficient if it presents intelligibly the grounds of the objection. If he deny the accusation, the denial may be oral and without oath, and must be entered upon the minutes. En. March 11, 1872. Am'd. 1880, 58.

§ 296. **Answer.** If an objection to the sufficiency of the accusation be not sustained, the accused must answer within such time as may be designated by the court. En. March 11, 1872. Am'd. 1873-4, 290; 1880, 58.

§ 297. **Trial.** If the accused plead guilty, or refuse to answer the accusation, the court shall proceed to judgment of removal or suspension. If he deny the matters charged, the court shall, at such time as it may appoint,

proceed to try the accusation. En. March 11, 1872. Am'd. 1880, 58.

Cal. Rep. Cit. 114, 370.

§ 298. Reference to take depositions. The court may, in its discretion, order a reference to a committee to take depositions in the matter. En. March 11, 1872. Am'd. 1880, 58.

§ 299. Judgment. Upon conviction, in cases arising under the first subdivision of section two hundred and eighty-seven, the judgment of the court must be that the name of the party shall be stricken from the roll of attorneys and counselors of the court, and that he be precluded from practicing as such attorney or counselor in all the courts of this state; and upon conviction in cases under the other subdivisions of that section, the judgment of the court may be according to the gravity of the offense charged; deprivation of the right to practice as attorney or counselor in the courts of this state permanently, or for a limited period. En. March 11, 1872. Am'd. 1873-4, 290; 1880, 58.

Cal. Rep. Cit. 67, 514; 78, 308; 107, 82.

CHAPTER II.

OTHER PERSONS INVESTED WITH SUCH POWERS.

§ 304. Receivers, executors, administrators, and guardians.

§ 304. Receivers, executors, administrators, and guardians. The appointment, powers, and duties of receivers, executors, administrators, and guardians, are provided for and prescribed in parts two and three of this code. En. March 11, 1872. Am'd. 1880, 59.

Cal. Rep. Cit. 56, 627.

Receivers: See post, secs. 564-569.

Executors and administrators: See post, Title XI.

Guardians: Post, secs. 1747-1809.

The foregoing section ends part one, which was entirely amended and the foregoing part one, adopted as a substitute therefor, by act approved April 1, 1880—Amendments 1880, 21 (Ban. ed. 63); took effect immediately—repealed all acts and parts of acts in conflict therewith.

PART II.

OF CIVIL ACTIONS.

- Title I. Of the Forms of Civil Actions, §§ 307-309.
- II. Time of Commencing Civil Actions, §§ 312-363.
- III. Parties to Civil Actions, §§ 367-390.
- IV. Place of Trial of Civil Actions, §§ 392-400.
- V. Manner of Commencing Suit, §§ 405-416.
- VI. Pleadings in Civil Actions, §§ 420-476.
- VII. Provisional Remedies in Civil Actions, §§ 478-574.
- VIII. Trial and Judgment in Civil Actions, §§ 577-680½.
- IX. Execution of the Judgment in Civil Actions, §§ 681-721.
- X. Actions in Particular Cases, §§ 726-827.
- XI. Proceedings in Justices' Courts, §§ 832-926.
- XII. Proceedings in Civil Actions in Police Courts, §§ 929-933.
- XIII. Appeals in Civil Actions, §§ 936-980.
- XIV. Miscellaneous Provisions, §§ 989-1059.

TITLE I.

OF THE FORM OF CIVIL ACTIONS.

- § 307. One form of civil action only.
- § 308. Parties to actions, how designated.
- § 309. Special issues not made by pleadings, how tried.

§ 307. One form of civil action only. There is in this state but one form of civil actions for the enforcement or protection of private rights and the redress or prevention of private wrongs. En. March 11, 1872.

Cal. Rep. Cit. 69, 267; 75, 521; 88, 443; 93, 57; 99, 171; 105, 408; 106, 657; 117, 6; 126, 634.

Prac. Act, sec. 2. En. April 29, 1851.
Cal. Rep. Cit. 1, 173.

§ 308. Parties to actions, how designated. In such action, the party complaining is known as the plaintiff, and the adverse party as the defendant. En. March 11, 1872.

Cal. Rep. Cit. 127, 637.

Prac. Act, ssec. 2. En. April 29, 1851.

Cal. Rep. Cit. 29, 166.

§ 309. Special issues not made by pleadings, how tried. A question of fact not put in issue by the pleadings may be tried by a jury, upon an order for the trial, stating distinctly and plainly the question of fact to be tried; and such order is the only authority necessary for a trial. En. March 11, 1872.

Cal. Rep. Cit. 67, 62.

Prac. Act, sec. 3. En. April 29, 1851.

Cal. Rep. Cit. 42, 628.

TITLE II.

OF THE TIME OF COMMENCING CIVIL ACTIONS.

Chapter I. The Time of Commencing Actions in General, § 312.

II. The Time of Commencing Actions for the Recovery of Real Property, §§ 315-328.

III. The Time of Commencing Actions Other Than for the Recovery of Real Property, §§ 335-349.

IV. General Provisions as to the Time of Commencing Actions, §§ 350-363.

CHAPTER I.

THE TIME OF COMMENCING ACTIONS IN GENERAL.

§ 312. Commencement of civil actions.

§ 312. Commencement of civil actions. Civil actions, without exception, can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued, unless where, in special cases, a different limitation is prescribed by statute. En. March 11, 1872. Am'd. 1897, 16.

Cal. Rep. Cit. 54, 150; 74, 479; 89, 538; 92, 629; 99, 503; 99, 614; 115, 172; 121, 198; 134, 468; 134, 470; 143, 223; 144, 248; 144, 249; 147, 558.

CHAPTER II.

THE TIME OF COMMENCING ACTIONS FOR THE RECOVERY OF REAL PROPERTY.

- § 315. When the people will not sue.
- § 316. When action cannot be brought by grantee from the state.
- § 317. When actions by the people or their grantees are to be brought within five years.
- § 318. Seisin within five years, when necessary in action for real property.
- § 319. Such seisin, when necessary in action or defense arising out of title to or rents of real property.
- § 320. Entry on real estate.
- § 321. Possession, when presumed. Occupation deemed under legal title, unless adverse.
- § 322. Occupation under written instrument or judgment, when deemed adverse.
- § 323. What constitutes adverse possession under written instrument or judgment.
- § 324. Premises actually occupied under claim of title deemed to be held adversely.
- § 325. What constitutes adverse possession under claim of title not written.
- § 326. Relation of landlord and tenant, as affecting adverse possession.
- § 327. Right of possession not affected by descent cast.
- § 328. Certain disabilities excluded from time to commence actions.

§ 315. When the people will not sue. The people of this state will not sue any person for or in respect to any real property, or the issues or profits thereof, by reason of the right or title of the people to the same, unless:

1. Such right or title shall have accrued within ten years before any action or other proceeding for the same is commenced; or,

2. The people, or those from whom they claim, shall have received the rents and profits of such real property, or of some part thereof, within the space of ten years. En. March 11, 1872.

Cal. Rep. Cit. 63, 307; 63, 310; 66, 563; 66, 564; 67, 663; 83, 286; 83, 287; 83, 288; 98, 305; 98, 402.

Title by occupancy: Civ. Code, sec. 1007.

§ 316. When action cannot be brought by grantee from the state. No action can be brought for or in respect to real property by any person claiming under letters patent or grants from this state, unless the same might have been commenced by the people as herein specified, in case such patent had not been issued or grant made. En. March 11, 1872.

Cal. Rep. Cit. 63, 307; 63, 310; 67, 663; 83, 286; 83, 287; 122, 157.

§ 317. When actions by the people or their grantees are to be brought within five years. When letters patent or grants of real property issued or made by the people of this state are declared void by the determination of a competent court, an action for the recovery of the property so conveyed may be brought, either by the people of the state, or by any subsequent patentee or grantee of the property, his heirs or assigns, within five years after such determination, but not after that period. En. March 11, 1872. Am'd. 1873-4, 291.

§ 318. Seisin within five years, when necessary in action for real property. No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seised or possessed of the property in question, within five years before the commencement of the action. En. March 11, 1872.

Cal. Rep. Cit. 48, 408; 55, 95; 58, 23; 63, 267; 63, 307; 65, 116; 66, 111; 67, 663; 68, 351; 68, 351; 68, 352; 68, 563; 69, 130; 71, 346; 71, 348; 72, 269; 77, 258; 80, 465; 80, 495; 80, 503; 83, 287; 84, 543; 84, 586; 85, 443; 89, 538; 90, 228; 91, 413; 91, 415; 91, 502; 92, 454; 92, 666; 95, 125; 96, 312; 96, 465; 97, 52; 97, 157; 101, 243; 101, 244; 109, 275; 112, 441; 112, 442; 112, 443; 117, 57; 119, 312; 122, 50; 122, 157; 124, 480; 125, 259; 129, 9; 129, 674; 132, 78; 132, 117; 137, 530; 138, 229; 138, 230; 139, 97; 140, 144; 140, 145; 140, 146; 140, 147; 140, 148; 144, 27; 144, 45; 144, 455; 145, 118; 146, 580; 147, 557; 147, 558; 147, 559.

Adverse possession. Secs. 321 et seq., *infra*.

Trespass upon real property, action for, must be brought within three years: Sec. 338, *post*.

Possession, presumptive evidence of ownership: See *post*, sec. 1963, *subd.* 11.

Action includes a special proceeding of a civil nature: Sec. 363, *post*.

§ 319 Such seisin, when necessary in action or defense arising out of title to or rents of real property. No cause of action, or defense to an action, arising out of the title to real property, or to rents or profits out of the same, can be effectual, unless it appear that the person prosecuting the action, or making the defense, or under whose

title the action is prosecuted or the defense is made, or the ancestor, predecessor or grantor of such person, was seised or possessed of the premises in question within five years before the commencement of the act in respect to which such action is prosecuted or defense made. En. March 11, 1872.

Cal. Rep. Cit. 55, 95; 58, 23; 63, 307; 65, 116; 66, 111; 67, 333; 68, 348; 68, 351; 69, 130; 71, 39; 71, 346; 71, 348; 72, 269; 73, 294; 77, 258; 80, 465; 83, 287; 84, 543; 84, 586; 85, 443; 86, 529; 90, 228; 91, 413; 91, 415; 92, 454; 96, 465; 109, 269; 109, 275; 112, 441; 117, 57; 119, 312; 122, 157; 124, 449; 125, 259; 129, 9; 132, 78; 132, 117; 138, 229; 138, 230; 144, 45.

Action includes a special proceeding of a civil nature: Post, sec. 363.

§ 320. Entry on real estate. No entry upon real estate is deemed sufficient or valid as a claim, unless an action be commenced thereupon within one year after making such entry, and within five years from the time when the right to make it descended or accrued. En. March 11, 1872.

Cal. Rep. Cit. 63, 307; 66, 111; 109, 269; 125, 259.

§ 321. Possession, when presumed. Occupation deemed under legal title, unless adverse. In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the property is presumed to have been possessed thereof within the time required by law, and the occupation of the property by any other person is deemed to have been under and in subordination to the legal title, unless it appear that the property has been held and possessed adversely to such legal title, for five years before the commencement of the action. En. March 11, 1872.

Cal. Rep. Cit. 63, 267; 63, 595; 65, 444; 71, 348; 83, 287; 103, 90; 109, 269; 138, 229; 138, 230; 144, 45; 146, 67.

Adverse possession: Post, secs. 322-325.

Forcible entry, one year: Post, sec. 1172.

Payment of taxes: See sec. 325, *infra*.

§ 322. Occupation under written instrument or judgment, when deemed adverse. When it appears that the occupant or those under whom he claims, entered into the

possession of the property under claim of title, exclusive of other right, founding such claim upon a written instrument, as being a conveyance of the property in question, or upon the decree or judgment of a competent court, and that there has been a continued occupation and possession of the property included in such instrument, decree, or judgment, or of some part of the property, under such claim, for five years, the property so included is deemed to have been held adversely, except that when it consists of a tract divided into lots, the possession of one lot is not deemed a possession of any other lot of the same tract. En. March 11, 1872.

Cal. Rep. Cit. 63, 153; 63, 595; 65, 444; 65, 445; 66, 111; 68, 592; 73, 294; 74, 16; 77, 487; 84, 543; 85, 443; 86, 529; 92, 667; 92, 668; 97, 26; 97, 273; 97, 378; 109, 269; 132, 123; 139, 102; 144, 45; 144, 596.

Entry not under written instrument: See post, sec. 325.

§ 323. What constitutes adverse possession under written instrument or judgment. For the purpose of constituting an adverse possession by any person claiming a title founded upon a written instrument, or a judgment or decree, land is deemed to have been possessed and occupied in the following cases:

1. Where it has been usually cultivated or improved;
2. Where it has been protected by a substantial inclosure;
3. Where, although not inclosed, it has been used for the supply of fuel, or of fencing timber for the purposes of husbandry, or for pasturage, or for the ordinary use of the occupant;
4. Where a known farm or single lot has been partly improved, the portion of such farm or lot that may have been left not cleared, or not inclosed according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved and cultivated. En. March 11, 1872.

Cal. Rep. Cit. 63, 153; 63, 595; 65, 119; 65, 120; 68, 352; 68, 592; 71, 348; 74, 16; 83, 287; 84, 543; 94, 662; 107, 106; 128, 187; 128, 458; 133, 79; 139, 102; 146, 162. Subd. 1—68, 531. Subd. 2—65, 444. Subd. 3—68, 349; 68, 351; 92, 668.

§ 324. Premises actually occupied under claim of title deemed to be held adversely. Where it appears that there has been an actual, continued occupation of land, under a

claim of title, exclusive of any other right, but not founded upon a written instrument, judgment, or decree, the land so actually occupied, and no other, is deemed to have been held adversely. En. March 11, 1872.

Cal. Rep. Cit. 63, 595; 83, 287; 84, 543; 89, 201; 91, 361; 128, 187; 144, 596.

Prescription, title by: Civ. Code, sec. 1007.

§ 325. What constitutes adverse possession under claim of title not written. For the purpose of constituting an adverse possession by a person claiming title, not founded upon a written instrument, judgment, or decree, land is deemed to have been possessed and occupied in the following cases only:

1. Where it has been protected by a substantial inclosure.

2. Where it has been usually cultivated or improved.

Provided, however, that in no case shall adverse possession be considered established under the provision of any section or sections of this code, unless it shall be shown that the land has been occupied and claimed for the period of five years continuously, and the party or persons, their predecessors and grantors, have paid all the taxes, state, county, or municipal, which have been levied, and assessed upon such land. En. March 11, 1872. Am'd. 1877-8, 99.

Cal. Rep. Cit. 54, 553; 59, 289; 59, 579; 63, 11; 63, 264; 63, 267; 63, 268; 63, 593; 63, 595; 65, 57; 65, 440; 68, 352; 68, 622; 69, 132; 70, 396; 71, 348; 71, 459; 71, 478; 72, 378; 73, 192; 73, 195; 74, 19; 75, 123; 77, 303; 79, 589; 83, 287; 84, 543; 85, 629; 89, 199; 89, 201; 89, 538; 91, 360; 91, 361; 97, 269; 97, 270; 97, 274; 99, 675; 103, 90; 107, 316; 109, 272; 114, 285; 114, 287; 114, 299; 117, 149; 119, 22; 120, 334; 120, 338; 120, 340; 121, 73; 126, 552; 128, 187; 130, 272; 132, 123; 144, 596; 146, 67.

Adverse possession: See ante, sec. 321.

§ 326. Relation of landlord and tenant, as affecting adverse possession. When the relation of landlord and tenant has existed between any persons, the possession of the tenant is deemed the possession of the landlord until the expiration of five years from the termination of the tenancy, or where there has been no written lease, until the expiration of five years from the time of the last pay-

ment of rent, notwithstanding that such tenant may have acquired another title, or may have claimed to hold adversely to his landlord. But such presumption cannot be made after the periods herein limited. En. March 11, 1872.

Cal. Rep. Cit. 54, 383; 63, 153; 66, 478; 67, 393; 72, 310; 107, 106; 114, 299.

Tenant denying landlord's title: Post, sec. 1962, subd. 4.

§ 327. Right of possession not affected by descent cast. The right of a person to the possession of real property is not impaired or affected by a descent cast in consequence of the death of a person in possession of such property. En. March 11, 1872.

Cal. Rep. Cit. 91, 361.

§ 328. Certain disabilities excluded from time to commence actions. If a person entitled to commence an action for the recovery of real property, or for the recovery of the possession thereof, or to make any entry or defense founded on the title to real property, or to rents or services out of the same, is, at the time such title first descends or accrues, either:

1. Under the age of majority;
2. Insane.
3. Imprisoned on a criminal charge, or in execution upon conviction of a criminal offense, for a term less than life;

The time, not exceeding twenty years, during which such disability continues is not deemed any portion of the time in this chapter limited for the commencement of such action, or the making of such entry or defense, but such action may be commenced, or entry or defense made, within the period of five years after such disability shall cease, or after the death of the person entitled, who shall die under such disability; but such action shall not be commenced, or entry or defense made, after that period. En. March 11, 1872. Am'd. 1903, 177.

Cal. Rep. Cit. 61, 597; 61, 599; 61, 601; 66, 111; 66, 516; 104, 453; 109, 275.

War: Post, sec. 354.

Absence from state: See post, sec. 351.

Successive disabilities: See post, sec. 358.

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§ 337. Within four years:

An action upon any contract, obligation, or liability, founded upon an instrument in writing executed within this state; provided, that wherever the time within which any such action must be so commenced would in any case expire by the terms of this section after the first day of June, one thousand nine hundred and six, and before the first day of January, one thousand nine hundred and seven, such action may be commenced at any time before the first day of January, one thousand nine hundred and seven, with the same force and effect as if commenced within four years, as in this section provided. [In effect June 3, 1906.]

CHAPTER III.

THE TIME OF COMMENCING ACTIONS OTHER THAN FOR THE RECOVERY OF REAL PROPERTY.

- 335. Periods of limitation prescribed.
- 336. Within five years.
- 337. Within four years.
- 338. Within three years.
- 339. Within two years.
- 340. Within one year.
- 341. Within six months.
- 342. Same.
- 343. Actions for relief not hereinbefore provided for.
- 344. Where cause of action accrues on mutual account.
- 345. Actions by the people subject to the limitations of this chapter.
- 346. Action to redeem mortgage.
- 347. Same, when some of mortgagors are not entitled to redeem.
- 348. No limitations where money deposited in bank.
- 349. Time for commencing actions under "local improvement" act

§ 335. Periods of limitation prescribed. The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows: En. March 11, 1872.

Cal. Rep. Cit. 64, 82; 68, 355; 71, 529; 73, 611; 112, 444; 121, 198; 144, 248; 144, 249.

§ 336. Within five years.

Within five years.

1. An action upon a judgment or decree of any court of the United States, or of any state within the United States.

2. An action for mesne profits of real property. En. March 11, 1872. Am'd. 1873-4, 291.

Cal. Rep. Cit. 54, 304; 68, 355; 68, 358; 72, 365; 99, 171; 120, 482; 127, 508; 130, 655; 139, 9. Subd. 1—115, 176; 128, 338; 134, 467. Subd. 2—83, 287.

Foreign liability: Post, sec. 361.

§ 337. Within four years.

Within four years:

An action upon any contract, obligation, or liability founded upon an instrument in writing executed in this state. En. March 11, 1872. Am'd. 1873-4, 291.

Cal. Rep. Cit. 54, 231; 59, 145; 66, 531; 66, 532; 66, 648; 66, 649; 70, 416; 70, 510; 72, 545; 74, 479; 75, 272; 75, 274; 76, 607; 79, 89; 81, 337; 82, 33; 82, 210; 82, 261; 91, 413; 91, 415; 91, 426; 91, 427; 91, 502; 93, 557; 94, 359; 99, 503; 99, 509; 99, 511; 99, 605;

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99, 659; 106, 18; 108, 568; 110, 152; 110, 289; 111, 336; 111, 337; 111, 340; 111, 342; 112, 78; 114, 37; 115, 139; 116, 235; 116, 338; 116, 356; 116, 598; 116, 599; 117, 5; 117, 7; 121, 198; 121, 250; 122, 414; 122, 418; 122, 539; 123, 265; 123, 350; 124, 156; 124, 449; 124, 510; 127, 191; 127, 529; 127, 530; 128, 469; 128, 474; 128, 543; 129, 375; 129, 416; 130, 337; 130, 656; 131, 200; 132, 160; 132, 196; 132, 423; 132, 454; 132, 597; 133, 36; 134, 15; 134, 16; 134, 278; 134, 443; 134, 447; 135, 258; 136, 242; 136, 589; 138, 660; 142, 473; 142, 475; 144, 248; 144, 249; 145, 627.

Four years' limitation where no other provision: Post, sec. 343.

§ 338. Within three years.

Within three years:

1. An action upon a liability created by statute other than a penalty or forfeiture;
2. An action for trespass upon real property;
3. An action for taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property;
4. An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake. En. March 11, 1872.

Cal. Rep. Cit. 59, 145; 71, 125; 72, 335; 75, 538; 81, 337; 90, 59; 90, 60; 91, 502; 96, 312; 99, 596; 100, 645; 104, 405; 108, 568; 110, 153; 112, 88; 112, 89; 112, 442; 112, 444; 115, 175; 115, 176; 115, 177; 117, 5; 117, 7; 117, 504; 127, 508; 129, 375; 132, 597; 132, 598; 137, 68; 137, 529; 137, 530; 134, 315; 140, 145; 140, 146; 140, 148; 142, 385; 144, 90. Subd. 1—61, 213; 68, 355; 71, 73; 73, 611; 76, 124; 77, 377; 82, 653; 90, 56; 92, 628; 92, 629; 96, 492; 99, 595; 103, 596; 104, 260; 115, 172; 117, 359; 125, 409; 127, 167; 127, 259; 131, 200; 131, 404; 131, 665; 132, 591; 132, 592; 141, 97; 145, 703; 145, 704; 145, 712. Subd. 2—67, 53; 78, 151; 92, 158; 117, 308; 122, 508; 122, 645; 129, 9; 129, 11; 142, 384; 142, 448. Subd. 3—55, 557; 61, 214; 67, 156; 77, 211; 122, 284; 137, 259. Subd. 4—52, 620; 59, 282; 67, 155; 71, 126; 71, 144; 71, 529; 73, 454; 74, 305; 82, 59; 85, 508; 91, 577; 93, 557; 97, 548; 99, 81; 99, 82; 99, 461; 99, 659; 100, 644; 106, 19; 107, 157; 108, 425; 110, 152; 110, 295; 112, 441; 112, 500; 113, 486; 123, 165; 124, 480; 124, 529; 129, 375; 129, 643; 132,

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§ 339. Within two years:

1. An action upon a contract, obligation, or liability, not founded upon an instrument of writing, or founded upon an instrument of writing executed out of the state.

2. An action against a sheriff, coroner, or constable, upon a liability incurred by the doing of an act in his official capacity, and in virtue of his office, or by the omission of an official duty, including the non-payment of money collected upon an execution. But this subdivision does not apply to an action for an escape.

Provided, that wherever the time within which any action mentioned in this section must be so commenced would in any case expire by the terms of this section after the first day of June, one thousand nine hundred and six, and before the first day of January, one thousand nine hundred and seven, such action may be commenced at any time before the first day of January, one thousand nine hundred and seven, with the same force and effect as if commenced within two years as in this section provided. [In effect June 3, 1906.]

461; 133, 37; 133, 603; 135, 169; 135, 251; 135, 601; 137, 94; 140, 144; 140, 152; 142, 604; 144, 454; 144, 455; 145, 703; 146, 579; 147, 617; 147, 620; 147, 745.

Statutory penalty: See sec. 340, subd. 1.

Executor or administrator—Limitation of actions to set aside sale, three years: Sec. 1573, post.

Corporations and stockholders, limitation as regards them: See post, sec. 359.

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§ 339. Within two years.

Within two years;

1. An action upon a contract, obligation, or liability, not founded upon an instrument of writing, or founded upon an instrument of writing executed out of the state.

2. An action against a sheriff, coroner, or constable, upon a liability incurred by the doing of an act in his official capacity, and in virtue of his office, or by the omission of an official duty, including the nonpayment of money collected upon an execution. But this subdivision does not apply to an action for an escape. En. March 11, 1872. Am'd. 1873-4, 292; 1905, 231.

Cal. Rep. Cit. 50, 613; 52, 45; 59, 145; 61, 213; 61, 214; 68, 358; 68, 391; 70, 417; 71, 294; 73, 611; 74, 68; 75, 274; 82, 261; 84, 92; 84, 93; 87, 265; 90, 66; 90, 67; 101, 157; 106, 21; 107, 66; 111, 340; 111, 342; 116, 482; 117, 5; 117, 7; 117, 504; 120, 483; 123, 265; 124, 156; 127, 508; 128, 536; 128, 542; 128; 543; 128, 547; 129, 525; 137, 258; 137, 259; 137, 386; 139, 315. Subd. 1—52, 44; 52, 652; 54, 330; 56, 126; 57, 209; 57, 431; 61, 151; 68, 307; 68, 355; 68, 390; 68, 468; 68, 493; 70, 128; 70, 416; 71, 73; 72, 590; 73, 575; 74, 63; 74, 527; 75, 193; 75, 194; 75, 272; 75, 538; 77, 189; 77, 211; 79, 79; 82, 59; 82, 210; 84, 93; 90, 65; 90, 253; 91, 281; 92, 628; 92, 629; 95, 318; 96, 492; 97, 548; 98, 294; 98, 296; 98, 299; 99, 595; 99, 659; 101, 156; 102, 380; 106, 18; 107, 59; 108, 568; 109, 218; 110, 537; 111, 336; 114, 37; 115, 141; 115, 175; 116, 256; 116, 475; 117, 308; 117, 359; 120, 28; 120, 161; 120, 434; 121, 589; 122, 106; 122, 508; 122, 509; 122, 645; 127, 591; 128, 535; 129, 9; 129, 12; 129, 375; 129, 525; 130, 334; 130, 335; 130, 337; 131, 7; 131, 439; 132, 483; 132, 592; 132, 598; 134, 28; 137, 385; 140, 93; 140, 200; 143, 132; 145, 703; 145, 704; 147, 511. Subd. 2—61, 213; 76, 606; 76, 607; 130, 498; 132, 596; 135, 102.

Mutual account: See post, sec. 344.

Actions for escape: See infra, sec. 340, subd. 4.

§ 340. Within one year.

Within one year:

1. An action upon a statute for a penalty or forfeiture, when the action is given to an individual, or to an individual and the state, except when the statute imposing it prescribes a different limitation.

2. An action upon a statute, or upon an undertaking in a criminal action, for a forfeiture or penalty to the people of this state.

3. An action for libel, slander, assault, battery, false imprisonment, seduction or for injury to or for the death of one caused by the wrongful act or neglect of another or by a depositor against a bank for the payment of a forged or raised check.

4. An action against a sheriff or other officer for the escape of a prisoner arrested or imprisoned on civil process.

5. An action against a municipal corporation for damages or injuries to property caused by a mob or riot. En. March 11, 1872. Am'd. 1873-4, 292; 1875-6, 89; 1905, 232.

Cal. Rep. Cit. 99, 596; 127, 508; 130, 133; 140, 328.
Subd. 1—71, 245; 130, 332; 132, 598. Subd. 3—65, 576; 92, 410; 94, 372; 94, 374.

One year against decedent's representatives: Post, sec. 353; after reversal on appeal: Post, sec. 355; entry upon real property: Ante, sec. 320.

Action against city for injury from riot: See Pol. Code, sec. 4454.

§ 341. Within six months.

Within six months:

An action against an officer, or officer de facto:

1. To recover any goods, wares, merchandise, or other property, seized by any such officer in his official capacity as tax collector, or to recover the price or value of any goods, wares, merchandise, or other personal property so seized, or for damages for the seizure, detention, sale of, or injury to any goods, wares, merchandise, or other personal property seized, or for damages done to any person or property in making any such seizure.

2. To recover stock sold for a delinquent assessment, as provided in section 347 of the Civil Code. En. March 11, 1872. Am'd. 1873-4, 292.

Cal. Rep. Cit. 117, 504; 130, 498. Subd. 1—117, 504; 130, 499. Subd. 2—133, 66.

Stock sold for assessment: Civ. Code, sec. 347.

Action for taxes paid under protest: See Pol. Code, sec. 3819.

Six months—against county: Post, sec. 342; Pol. Code, sec. 4075; by decedent's representatives, sec. 353.

Suits for penalties for violating highway laws: See Pol. Code, sec. 2935.

§ 342. Same. Actions on claims against a county, which have been rejected by the board of supervisors, must be commenced within six months after the first rejection thereof by such board. En. March 11, 1872.

Cal. Rep. Cit. 75, 538; 116, 475; 116, 482.

Action for riot: Ante, sec. 340, subd. 5.

Action against county on rejected claim: See Pol. Code, sec. 4075.

§ 343. Actions for relief not hereinbefore provided for. An action for relief not hereinbefore provided for, must be commenced within four years after the cause of action shall have accrued. En. March 11, 1872.

Cal. Rep. Cit. 52, 44; 54, 304; 58, 366; 58, 372; 59, 88; 59, 145; 60, 647; 62, 515; 66, 111; 68, 355; 69, 267; 71, 73; 71, 125; 71, 126; 72, 365; 72, 366; 73, 294; 73, 611; 74, 547; 77, 258; 77, 377; 81, 337; 82, 210; 84, 253; 90, 67; 90, 228; 91, 413; 91, 415; 91, 426; 91, 427; 91, 502; 92, 628; 92, 629; 97, 157; 97, 159; 99, 659; 100, 644; 106, 18; 112, 441; 113, 689; 116, 256; 117, 5; 117, 7; 118, 106; 120, 483; 121, 39; 124, 156; 124, 449; 124, 480; 127, 508; 128, 469; 129, 375; 129, 643; 132, 454; 137, 174; 137, 530; 139, 9; 141, 97; 142, 604; 144, 27; 147, 619; 147, 745; 147, 746.

Bank deposits, no limitation: Ante, sec. 343.

§ 344. Where cause of action accrues on mutual account. In an action brought to recover a balance due upon a mutual, open, and current account, where there have been reciprocal demands between the parties, the cause of action is deemed to have accrued from the time of the last item proved in the account on either side. En. March 11, 1872.

Cal. Rep. Cit. 74, 527; 109, 173; 121, 589; 125, 411; 141, 337.

§ 345. Actions by the people subject to the limitations of this chapter. The limitations prescribed in this chapter apply to actions brought in the name of the state or for the benefit of the state, in the same manner as to actions by private parties, except that actions for the recovery of money due on account of the presence of patients at the state hospitals may be commenced at any time within three years after the accrual of the same. En. March 11, 1872. Am'd. 1905, 487.

Cal. Rep. Cit. 66, 563; 71, 73; 73, 575; 73, 611; 73, 612; 77, 377.

Action by people: Ante, sec. 315.

§ 346. Action to redeem mortgage. An action to redeem a mortgage of real property with or without an account of rents and profits, may be brought by the mortgagor, or those claiming under him, against the mortgagee in possession, or those claiming under him, unless he or they have continuously maintained an adverse possession of the mortgaged premises for five years after breach of some condition of the mortgage. En. March 11, 1872.

Cal. Rep. Cit. 69, 267; 72, 311; 73, 294; 80, 353; 80, 356; 88, 445; 95, 195; 95, 196; 95, 197; 95, 201; 95, 203; 100, 453; 119, 312; 119, 314.

"Action" includes a special proceeding of a civil nature: Post, sec. 363.

§ 347. Same, when some of mortgagors are not entitled to redeem. If there is more than one such mortgagor, or more than one person claiming under a mortgagor, some of whom are not entitled to maintain such an action, under the provisions of this chapter, any one of them, who is entitled to maintain such an action, may redeem therein a divided or undivided part of the mortgaged premises, according as his interest may appear, and have an accounting for a part of the rents and profits, proportionate to his interest in the mortgaged premises, on payment of a part of the mortgage money, bearing the same proportion to the whole of such money as the value of his divided or undivided interest in the premises bears to the whole of such premises. En. March 11, 1872.

Cal. Rep. Cit. 69, 267.

§ 348. No limitations where money deposited in bank. To actions brought to recover money or other property

deposited with any bank, banker, trust company, or savings and loan society, there is no limitation. En. Stats. 1873-4, 293.

Cal. Rep. Cit. 64, 122; 65, 72; 78, 611; 125, 412; 127, 674.

§ 349. Time for commencing actions under "local improvement" act. Any action to contest an assessment levied by the legislative body of any municipality under the terms of the "local improvement act of 1901," must be commenced within thirty days after the entry upon the minutes of such legislative body of the resolution provided for in section eight of said "local improvement act of 1901." En. Stats. 1900-01, 44.

CHAPTER IV.

GENERAL PROVISIONS AS TO THE TIME OF COMMENCING ACTIONS.

- § 350. When an action is commenced.
- § 351. Exception, where defendant is out of the state.
- § 352. Exceptions as to persons under disabilities.
- § 353. Provision where person entitled dies before limitation expires.
- § 354. In suits by aliens, time of war to be deducted.
- § 355. Provision where judgment has been reversed.
- § 356. Provision where action is stayed by injunction.
- § 357. Disability must exist when right of action accrued.
- § 358. When two or more disabilities exist, etc.
- § 359. This title not applicable to actions against directors, etc. Limitations in such cases prescribed.
- § 360. Acknowledgment or new promise must be in writing.
- § 361. Limitation laws of other states, effect of.
- § 362. Existing causes of action not affected.
- § 363. "Action" includes a special proceeding.

§ 350. When an action is commenced. An action is commenced, within the meaning of this title, when the complaint is filed. En. March 11, 1872.

Cal. Rep. Cit. 58, 150; 136, 304.

§ 351. Exception, where defendant is out of the state. If, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the term herein limited, after his return to the state, and if, after the cause of action accrues, he departs from the state, the time of his absence is not a part of the time limited for the commencement of the action. En. March 11, 1872.

Cal. Rep. Cit. 66, 205; 95, 195; 101, 157; 133, 363.

§ 352. Exception as to persons under disabilities. If a person entitled to bring an action, mentioned in chapter three of this title, be at the time the cause of action accrued, either:

1. Within the age of majority; or,
2. Insane; or,
3. Imprisoned on a criminal charge, or in execution under the sentence of a criminal court for a term less than for life; or,
4. A married woman, and her husband be a necessary party with her in commencing such action:

—The time of such disability is not a part of the time limited for the commencement of the action. En. March 11, 1872.

Cal. Rep. Cit. 65, 576.

Disabilities stopping running of statute: See ante, sec. 328.

§ 353. Provision where person entitled dies before limitation expires. If a person entitled to bring an action die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced by his representatives, after the expiration of that time, and within six months from his death. If a person against whom an action may be brought, die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced against his representatives after the expiration of that time, and within one year after the issuing of letters testamentary or of administration. En. March 11, 1872.

Cal. Rep. Cit. 50, 648; 53, 378; 67, 181; 85, 443; 94, 359; 94, 360; 116, 356; 119, 66; 123, 388; 127, 191; 127, 195; 136, 372; 142, 474; 145, 628; 146, 579.

Substitution of parties: See post, sec. 385.

Survival of actions: See post, secs. 385, 1582, 1584.

"Action" includes a special proceeding of a civil nature: See post, sec. 363.

§ 354. In suits by allens, time of war to be deducted. When a person is an alien subject, or citizen of a country at war with the United States, the time of the continuance of the war is not part of the period limited for the commencement of the action. En. March 11, 1872.

§ 355. Provision where judgment has been reversed. If an action is commenced within the time prescribed

therefor, and a judgment thereon for the plaintiff be reversed on appeal, the plaintiff, or if he die and the cause of action survive, his representatives, may commence a new action within one year after the reversal. En. March 11, 1872.

Cal. Rep. Cit. 137, 530.

§ 356. Provision where action is stayed by injunction. When the commencement of an action is stayed by injunction or statutory prohibition, the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action. En. March sec. 328.

Cal. Rep. Cit. 54, 235; 61, 600; 63, 122; 66, 532; 89, 392; 127, 192; 141, 100.

§ 357. Disability must exist when right of action accrued. No person can avail himself of a disability, unless it existed when his right of action accrued. En. March 11, 1872.

Successive disabilities: See *infra*, sec. 358, and *ante*, sec. 328.

§ 358. When two or more disabilities exist, etc. When two or more disabilities coexist at the time the right of action accrues, the limitation does not attach until they are removed. En. March 11, 1872.

Cal. Rep. Cit. 68, 352; 77, 372.

§ 359. This title not applicable to actions against directors, etc. Limitations in such cases prescribed. This title does not affect actions against directors or stockholders of a corporation, to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached, or the liability was created. En. March 11, 1872.

Cal. Rep. Cit. 59, 546; 59, 547; 74, 171; 82, 653; 97, 97; 99, 613; 99, 614; 99, 615; 103, 596; 108, 5; 117, 163; 124, 94; 125, 8; 125, 409; 125, 410; 125, 412; 125, 454; 125, 455; 125, 488; 127, 167; 127, 259; 127, 260; 127, 527; 127, 528; 127, 671; 142, 384; 143, 224; 145, 703; 145, 704; 147, 558.

Director's personal liability: See Civ. Code, sec. 309.

§ 360. Acknowledgment or new promise must be in writing. No acknowledgment or promise is sufficient evi-

dence of a new or continuing contract, by which to take the case out of the operation of this title, unless the same is contained in some writing, signed by the party to be charged thereby. En. March 11, 1872.

Cal. Rep. Cit. 51, 217; 56, 344; 56, 379; 56, 380; 66, 190; 70, 414; 74, 67; 74, 69; 75, 275; 76, 101; 98, 298; 122, 414; 122, 415; 122, 417; 122, 419; 127, 530; 127, 671; 128, 476; 130, 251; 134, 19; 134, 20; 134, 21; 134, 29; 137, 389; 138, 659; 143, 133.

§ 361. Limitation laws of other states, effect of. When a cause of action has arisen in another state, or in a foreign country; and by the laws thereof an action thereon cannot there be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this state, except in favor of one who has been a citizen of this state, and who has held the cause of action from the time it accrued. En. March 11, 1872.

Cal. Rep. Cit. 72, 266; 79, 79; 95, 194; 95, 197; 95, 198; 95, 200; 95, 206; 99, 515.

Prac. Act, sec. 532. En. April 29, 1851.

§ 362. Existing causes of action not affected. This title does not extend to actions already commenced, nor to cases where the time prescribed in any existing statute, for acquiring a right or barring a remedy has fully run, but the laws now in force are applicable to such actions and cases, and are repealed subject to the provisions of this section. En. March 11, 1872.

Cal. Rep. Cit. 95, 202.

Repeal of limitation: See ante, secs. 9, 18.

§ 363. "Action" includes a special proceeding. The word "action," as used in this title, is to be construed, whenever it is necessary so to do, as including a special proceeding of a civil nature. En. March 11, 1872.

Cal. Rep. Cit. 55, 588; 95, 202; 99, 614; 117, 6; 118, 661; 118, 662; 141, 98; 145, 47.

TITLE III.

OF THE PARTIES TO CIVIL ACTIONS.

- § 367. Action to be in name of party in interest.
- § 368. Assignment of thing in action not to prejudice defense.
- § 369. Executor, trustee, etc., may sue without joining the persons beneficially interested.
- § 370. When a married woman is a party—actions by and against.
- § 371. Wife may defend, when.
- § 372. Infant to appear by guardian.
- § 373. Guardian, how appointed.
- § 374. Unmarried female may sue, for her own seduction.
- § 375. Father, etc., may sue, for seduction of daughter, etc.
- § 376. Father, etc., may sue, for injury or death of child.
- § 377. When representatives may sue for death of one caused by the wrongful act of another.
- § 378. Who may be joined as plaintiffs.
- § 379. Who may be joined as defendants.
- § 380. Parties defendant in an action to determine conflicting claims to real property.
- § 381. Parties holding title under a common source, when may join.
- § 382. Parties in interest, when to be joined. When one or more may sue or defend for the whole.
- § 383. Plaintiff may sue in one action the different parties to commercial paper or insurance policies.
- § 384. Tenants in common, etc., may sever in bringing or defending actions.
- § 385. Action, when not to abate by death, marriage, or other disability. Proceedings in such case.
- § 386. Another person may be substituted for the defendant.
- § 387. Intervention, when it takes place and how made.
- § 388. Associates may be sued by name of association.
- § 389. Court, when to decide controversy or to order other parties to be brought in.
- § 390. Actions against fire departments.

§ 367. Action to be in name of party in interest. Every action must be prosecuted in the name of the real party in interest, except as provided in section three hundred and sixty-nine of this Code. En. March 11, 1872. Am'd. 1880, 63.

Cal. Rep. Cit. 55, 129; 57, 586; 61, 614; 66, 58; 666, 445; 68, 368; 69, 145; 77, 543; 87, 247; 112, 82; 123, 186; 138, 219.

Prac. Act, sec. 4. En. April 29, 1851. Am'd. 1854, 50; 1855, 303; 1864, 29.

Cal. Rep. Cit. 6, 248; 6, 457; 9, 328; 12, 98; 18, 618; 22, 235; 22, 236; 22, 239; 25, 189; 25, 252; 26, 148; 32, 90; 32, 118; 33, 127; 34, 148; 138, 219; 146, 210; 146, 579; 147, 389.

Assignees: See post, sec. 368.

Association, how may be sued: See infra, sec. 388.

Code Civil Proc.—9.

Right to sue on contract made for one's benefit: See Civ. Code, sec. 1559.

Parties plaintiff, generally.—All persons interested may be joined: Secs. 378, 382, post. If any refuse, they may be made defendants: Post, sec. 382.

§ 368. Assignment of thing in action not to prejudice defense. In the case of an assignment of a thing in action, the action by the assignee is without prejudice to any setoff or other defense existing at the time of, or before, notice of the assignment; but this section does not apply to a negotiable promissory note or bill of exchange, transferred in good faith and upon good consideration, before maturity. En. March 11, 1872.

Cal. Rep. Cit. 55, 129; 65, 438; 66, 42; 76, 636; 81, 327; 101, 288; 101, 289; 107, 62; 107, 67; 113, 171; 123, 161; 126, 111; 132, 584; 133, 47; 133, 685.

Prac. Act, sec. 5. En. April 29, 1851.

Cal. Rep. Cit. 9, 50; 33, 528; 123, 161.

Assignment and survival of causes of action: See post, secs. 1582 et seq.

See the subject of negotiable instruments and the rights of parties thereto discussed in the Civil Code, secs. 3086 et seq.

Thing in action defined: Civ. Code, sec. 953.

§ 369. Executor, trustee, etc., may sue without joining the persons beneficially interested. An executor or administrator, or trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the persons for whose benefit the action is prosecuted. A person with whom, or in whose name, a contract is made for the benefit of another, is a trustee of an express trust, within the meaning of this section. En. March 11, 1872.

Cal. Rep. Cit. 57, 586; 57, 587; 66, 446; 68, 420; 71, 598; 74, 375; 75, 127; 75, 250; 77, 542; 80, 31; 83, 486; 87, 247; 89, 605; 91, 564; 98, 497; 100, 509; 110, 575; 114, 388; 119, 576.

Prac. Act, sec. 6. En. April 29, 1851. Am'd. 1854, 59.

Cal. Rep. Cit. 1, 174; 3, 321; 25, 29; 28, 543; 32, 117; 34, 138; 85, 445; 142, 145; 146, 210; 147, 311; 147, 390.

Executors and administrators, action by, jointly with heirs or devisees, for possession of real estate or quieting

title: Sec. 1452. Actions by, alone: Sec. 1581-3. To set aside fraudulent deeds made by deceased: Sec. 1589.

§ 370. When a married woman is a party—actions by and against. When a married woman is a party, her husband must be joined with her, except:

1. When the action concerns her separate property, or her right or claim to the homestead property, she may sue alone.

2. When the action is between herself and her husband, she may sue or be sued alone.

3. When she is living separate and apart from her husband by reason of his desertion of her, or by agreement in writing entered into between them, she may sue or be sued alone. En. March 11, 1872. Am'd. 1873-4, 293.

Cal. Rep. Cit. 53, 460; 54, 178; 65, 631; 67, 391; 71, 425; 96, 611; 110, 89; 122, 259; 126, 82; 137, 277; 138, 165, Subd. 1—67, 390; 87, 468; 105, 690; 105, 691; 110, 425; 126, 481; 134, 421; 136, 302. Subd. 3—77, 391; 105, 690; 122, 255.

Prac. Act, sec. 7. En. April 29, 1851. Am'd. 1867-8, 550.

Cal. Rep. Cit. 3, 87; 15, 311; 19, 129; 26, 443; 29, 83; 31, 335; 32, 342; 36, 450; 36, 451; 36, 453; 42, 412.

Contracts of married women generally: See Civ. Code, sec. 158.

Sole traders: Post, secs. 1811 et seq.

§ 371. Wife may defend, when. If a husband and wife be sued together the wife may defend for her own right, and if the husband neglect to defend, she may defend for his right also. En. March 11, 1872.

Prac. Act, sec. 8. En. April 29, 1851.

Cal. Rep. Cit. 5, 388.

§ 372. Infant to appear by guardian. When an infant, or an insane or incompetent person is a party, he must appear either by his general guardian or by a guardian ad litem appointed by the court, in which the action is pending in each case. A guardian ad litem may be appointed in any case, when it is deemed by the court in which the action or proceeding is prosecuted, or by a judge thereof, expedient to represent the infant, insane or incompetent person in the action or proceeding, notwithstanding he

may have a general guardian and may have appeared by him. En. March 11, 1872. Am'd. 1873-4, 294; 1880, 63.

Cal. Rep. Cit. 56, 322; 63, 89; 64, 238; 54, 593; 66, 361; 74, 55; 75, 599; 87, 532; 89, 637; 94, 55; 103, 390; 111, 271; 120, 697; 133, 418.

Prac. Act, sec. 9. En. April 29, 1851.

Cal. Rep. Cit. 19, 632; 64, 593.

Appointment of guardian ad litem: See next section.

Guardian and ward, generally: See post, secs. 1747 et seq.; and Civ. Code, secs. 236 et seq.

Insane or incompetent person: Civ. Code, secs. 36, 38-42; guardian or: Post, secs. 1763-1766.

Minors and persons of unsound mind, their rights and liabilities: Civ. Code, secs. 33 et seq.

§ 373. Guardian, how appointed. When a guardian ad litem is appointed by the court, he must be appointed as follows:

1. When the infant is plaintiff, upon the application of the infant, if he be of the age of fourteen years, or if under that age, upon the application of a relative or friend of the infant.

2. When the infant is defendant, upon the application of the infant, if he be of the age of fourteen years, and apply within ten days after the service of the summons, or if under that age, or if he neglect so to apply, then upon the application of a relative or friend of the infant, or of any other party to the action.

3. When an insane or incompetent person is a party to an action or proceeding, upon the application of a relative or friend of such insane or incompetent person, or of any other party to the action of proceeding. En. March 11, 1872. Am'd. 1880, 63.

Cal. Rep. Cit. 56, 322; 63, 562; 64, 594; 64, 597; 66, 53; 66, 360; 74, 55; 119, 576; 133, 418.

Prac. Act, sec. 10. En. April 29, 1851.

Cal. Rep. Cit. 19, 632; 64, 594.

§ 374. Unmarried female may sue, for her own seduction. An unmarried female may prosecute, as plaintiff, an action for her own seduction, and may recover therein

such damages, pecuniary or exemplary, as are assessed in her favor. En. March 11, 1872.

Cal. Rep. Cit. 98, 59.

Exemplary damages: See Civ. Code, sec. 3294.

Damages for seduction: See Civ. Code, sec. 3339.

§ 375. Father, etc., may sue, for seduction of daughter, etc. A father, or in case of his death or desertion of his family, the mother may prosecute as plaintiff for the seduction of the daughter, and the guardian for the seduction of the ward, though the daughter or ward be not living with or in the service of the plaintiff at the time of the seduction or afterward, and there be no loss of service. En. March 11, 1872.

Guardian ad litem: Ante, sec. 372; appointment cf: Ante, sec. 373.

§ 376. Father, etc., may sue, for injury or death of child. A father, or in case of his death or desertion of his family, the mother, may maintain an action for the injury or death of a minor child, and a guardian for the injury or death of his ward, when such injury or death is caused by the wrongful act or neglect of another. Such action may be maintained against the person causing the injury or death, or if such person be employed, by another person who is responsible for his conduct, also against such other person. En. March 11, 1872. Am'd. 1873-4, 294.

Cal. Rep. Cit. 50, 613; 56, 389; 56, 393; 56, 394; 62, 336; 76, 241; 95, 520; 95, 521; 115, 390; 139, 622.

Prac. Act, sec. 11. En. April 29, 1851.

Cal. Rep. Cit. 19, 632; 25, 435; 32, 117; 32, 119; 44, 48.

Guardian and ward: Post, secs. 1768-1776, and Civ. Code, secs. 236-258.

§ 377. When representatives may sue for death of one caused by the wrongful act of another. When the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also

against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just. En. March 11, 1872. Am'd. 1873-4, 294.

Cal. Rep. Cit. 50, 613; 56, 389; 56, 393; 57, 26; 57, 37; 57, 38; 59, 300; 59, 301; 60, 609; 62, 336; 63, 484; 76, 241; 83, 19; 84, 521; 84, 522; 86, 143; 95, 521; 110, 283; 110, 285; 110, 289; 115, 391; 124, 129; 124, 130; 127, 439; 137, 399; 139, 483; 139, 484; 139, 487; 40, 512.

§ 378. Who may be joined as plaintiffs. All persons having an interest in the subject of the action and in obtaining the relief demanded, may be joined as plaintiffs, except as otherwise provided in this title. En. March 11, 1872.

Cal. Rep. Cit. 68, 420; 115, 583; 136, 639; 137, 673.

Prac. Act, sec. 12. En. April 29, 1851.

Cal. Rep. Cit. 8, 516.

Cotenants: Post, sec. 381.

Special partners: Civ. Code, sec. 2492.

Other parties, bringing in: Post, sec. 389.

Misjoinder and nonjoinder of plaintiffs: Post, sec. 430.

§ 379. Who may be joined as defendants. Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein. And in an action to determine the title or right of possession to real property which, at the time of the commencement of the action, is in the possession of a tenant, the landlord may be joined as a party defendant. En. March 11, 1872.

Cal. Rep. Cit. 63, 119; 63, 308; 67, 663; 69, 574; 77, 641; 79, 120; 84, 5; 116, 90; 123, 661; 136, 639; 138, 90.

Prac. Act, sec. 13. En. April 29, 1851.

Cal. Rep. Cit. 1, 174; 9, 270; 22, 205.

Joining landlord: Ante, sec. 379; Civ. Code, sec. 1949.

Parties to foreclosure: Post, sec. 726.

Corporation stockholders: Const. Cal., art. 12, secs. 3, 4; Civ. Code, sec. 322.

Associates, suing by common name: Post, sec. 388.

Quieting title, suits: See post, sec. 738.

Executors, unqualified, need not be joined: Sec. 1587.

Fresh parties, bringing in: Post, sec. 389.

Service on one defendant out of several, effect of: Post, sec. 414.

State, suits against—Suits may be brought against the state in such manner and in such courts as shall be directed by law: Const. Cal., art. 20, sec. 6.

Actions against state, statutes relating to: See post, Appendix, State.

§ 330. Parties defendant in an action to determine conflicting claims to real property. In an action brought by a person out of possession of real property, to determine an adverse claim of an interest or estate therein, the person making such adverse claim and persons in possession may be joined as defendants, and if the judgment be for the plaintiff, he may have a writ for the possession of the premises, as against the defendants in the action, against whom the judgment has passed. En. March 11, 1872. Am'd. 1873-4, 295.

Cal. Rep. Cit. 66, 269; 80, 465; 83, 172; 90, 343; 94, 466; 118, 36.

Actions to quiet title: See post, sec. 738.

Writ of possession: See post, sec. 682.

Fresh parties, bringing in: See post, sec. 389.

Nonjoinder, misjoinder of parties: See Sec. 430.

§ 331. Parties holding title under a common source, when may join. Any two or more persons claiming any estate or interest in lands under a common source of title, whether holding as tenants in common, joint tenants, coparceners, or in severalty, may unite in an action against any person claiming an adverse estate or interest therein, for the purpose of determining such adverse claim, or if [of] establishing such common source of title, or of declaring the same to be held in trust, or of removing a cloud upon the same. En. March 11, 1872. Am'd. 1873-4, 295.

Cal. Rep. Cit. 58, 182; 83, 351; 129, 61; 137, 306.

Cotenants may sever: See sec. 384, *infra*.

Ejectment: See sec. 738, post, and sec. 379, *supra*.

Quieting title: See post, sec. 738.

Joint tenants: See post, sec. 384.

§ 332. Parties in interest when to be joined. When one or more may sue or defend the whole. Of the parties

to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all. En. March 11, 1872.

Cal. Rep. Cit. 58, 183; 58, 184; 60, 532; 69, 621; 74, 442; 77, 248; 77, 249; 79, 372; 94, 581; 95, 256; 104, 7; 104, 8; 104, 10; 110, 460; 129, 243; 136, 614; 136, 635; 136, 639; 144, 29. Subd. 2—84, 81.

Prac. Act., sec. 14. En. April 29, 1851.

Cal. Rep. Cit. 1, 174; 3, 87; 7, 334; 8, 516; 18, 322; 20, 218.

Joinder, misjoinder, nonjoinder: Post, sec. 430.

Executors, etc., not qualified need not join: Post, sec. 1587.

§ 383. Plaintiff may sue in one action the different parties to commercial paper or insurance policies. Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, and sureties on the same or separate instruments, may all or any of them be included in the same action, at the option of the plaintiff; and all or any of them join as plaintiffs in the same action, concerning or affecting the obligation or instrument upon which they are severally liable. Where the same person is insured by two or more insurers separately in respect to the same subject and interest, such person, or the payee under the policies, or the assignee of the cause of action, or other successor in interest of such assured or payee, may join all or any of such insurers in a single action for the recovery of a loss under the several policies, and in case of judgment a several judgment must be rendered against each of such insurers according as his liability shall appear. En. March 11, 1872. Am'd. 1897, 19; 1903, 203.

Cal. Rep. Cit. 48, 236; 58, 100; 65, 387; 73, 270; 75, 634; 81, 653; 93, 58; 94, 93; 101, 420; 118, 420; 120, 690; 123, 440; 125, 686; 135, 648; 136, 302.

Prac. Act., sec. 15. En. April 29, 1851.

Cal. Rep. Cit. 1, 176; 6, 183; 13, 86; 24, 382; 25, 526.

Judgment for or against one or more of several parties:
See post, secs. 414, 578, 579.

§ 384. Tenants in common, etc., may sever in bringing or defending actions. All persons holding as tenants in common, joint tenants or coparceners, or any number less than all, may jointly or severally commence or defend any civil action or proceeding for the enforcement or protection of the rights of such party. En. March 11, 1872.

Cal. Rep. Cit. 61, 262; 80, 630; 91, 598; 110, 425; 136, 635; 137, 526; 139, 562.

Co-claimants, united as plaintiffs: Sec. 381.

§ 385. Action, when not to abate by death, marriage, or other disability. Proceedings in such case. An action or proceeding does not abate by the death or any disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of the death or any disability of a party, the court, on motion, may allow the action or proceeding to be continued by or against his representative or successor in interest. In case of any other transfer of interest, the action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding. En. March 11, 1872. Am'd. 1873-4, 295.

Cal. Rep. Cit. 46, 576; 50, 659; 54, 203; 54, 387; 58, 34; 64, 82; 64, 430; 64, 476; 64, 596; 65, 388; 66, 42; 66, 445; 68, 420; 72, 266; 76, 409; 77, 648; 79, 354; 80, 264; 87, 27; 93, 390; 93, 656; 98, 125; 99, 510; 111, 32; 112, 643; 116, 276; 117, 581; 123, 253; 123, 254; 124, 142; 124, 143; 124, 145; 124, 307; 128, 269; 132, 454; 132, 456; 133, 256; 135, 224; 138, 587; 138, 657; 139, 420; 140, 179; 142, 143; 146, 654.

Prac. Act, sec. 16. En. April 29, 1851.

Cal. Rep. Cit. 5, 282; 29, 372; 29, 377; 30, 475; 30, 476; 31, 336; 32, 119; 49, 208; 50, 659; 64, 596.

If a party die, judgment against his representative must be that he pay in due course of administration: Post, sec. 1504.

Necessity for claiming against estate of deceased: Post, secs. 1493, 1502.

Death after verdict or decision and before judgment: See post, sec. 669.

Survival of actions: See post, secs. 1582 et seq.

§ 386. Another person may be substituted for the defendant. A defendant against whom an action is pending upon a contract, or for specific personal property, may, at any time before answer, upon affidavit that a person not a party to the action makes against him, and without any collusion with him, a demand upon such contract, or for such property, upon notice to such person and the adverse party, apply to the court for an order to substitute such person in his place, and discharge him from liability to either party, on his depositing in court the amount claimed on the contract, or delivering the property, or its value, to such person as the court may direct; and the court may, in its discretion, make the order. And whenever conflicting claims are or may be made upon a person for or relating to personal property, or the performance of an obligation, or any portion thereof, such person may bring an action against the conflicting claimants to compel them to interplead and litigate their several claims among themselves. The order of substitution may be made, and the action of interpleader may be maintained, and the applicant or plaintiff be discharged from liability to all or any of the conflicting claimants, although their titles or claim have not a common origin, or are not identical, but are adverse to and independent of one another. En. March 11, 1872. Am'd. 1881, 19.

Cal. Rep. Cit. 59, 273; 65, 160; 66, 42; 69, 153; 69, 155; 72, 234; 72, 516; 73, 303; 74, 257; 75, 543; 111, 376; 111, 393; 123, 110; 127, 518; 131, 325; 133, 643; 137, 70; 141, 102; 142, 113.

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§ 387. Intervention, when it takes place and how made. Any person may, before the trial, intervene in an action or proceeding, who has an interest in the matter in litigation, in the success of either of the parties, or an interest against both. An intervention takes place when a third person is permitted to become a party to an action or proceeding between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and the defendant, and is made by complaint, setting forth the grounds upon which the intervention rests, filed by leave of the court and served upon the parties to the action or proceeding who have not appeared, and upon the attorneys of the parties who have

appeared, who may answer or demur to it as if it were an original complaint. En. March 11, 1872. Am'd. 1873-4, 296.

Cal. Rep. Cit. 52, 511; 53, 744; 57, 77; 58, 355; 60, 125; 61, 556; 63, 5; 63, 562; 64, 476; 66, 73; 93, 319; 97, 455; 101, 331; 101, 332; 104, 6; 104, 7; 104, 8; 108, 222; 111, 392; 112, 651; 114, 373; 121, 261; 123, 255; 126, 318; 128, 685; 130, 44; 131, 92; 132, 290; 137, 477; 140, 377; 144, 728.

Eminent domain—intervention in: Post, sec. 1246.

§ 388. Associates may be sued by name of association. When two or more persons, associated in any business, transact such business under a common name, whether it comprise the names of such persons or not, the associates may be sued by such common name, the summons in such cases being served on one or more of the associates; and the judgment in the action shall bind the joint property of all the associates, in the same manner as if all had been named defendants, and had been sued upon their joint liability. En. March 11, 1872.

Cal. Rep. Cit. 55, 367; 67, 146; 67, 147; 67, 569; 69, 458; 69, 621; 73, 391; 73, 393; 94, 299; 94, 300; 94, 302; 115, 508; 123, 647; 136, 302; 139, 177.

Business associates—common name: Sec. 414.

Partners under fictitious name must file certificate: See Civ. Code, secs. 2466 et seq.

§ 389. Court, when to decide controversy or to order other parties to be brought in. The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court must then order them to be brought in, and to that end may order amended and supplemental pleadings, or a cross-complaint to be filed, and summons thereon to be issued and served. And when, in an action for the recovery of real or personal property, a person, not a party to the action, but having an interest in the subject thereof, makes application to the court to be made a party, it may order him to be brought in, by the proper amendment. En. March 11, 1872. Am'd. 1897, 9.

Cal. Rep. Cit. 64, 476; 65, 455; 69, 621; 74, 443; 76, 542; 95, 256; 112, 651; 115, 420; 116, 447; 116, 453; 117, 550; 126, 318; 130, 521; 136, 536; 136, 639; 137, 658; 142, 70; 144, 729; 145, 570; 146, 498.

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Prac. Act, sec. 17. En. April 29, 1851.

Cal. Rep. Cit. 1, 177; 5, 282; 9, 97; 22, 205; 27, 333; 38, 522; 44, 396.

Joining landlord: Ante, sec. 379; Civ. Code, sec. 1949.
Party, adding and amending name of: Ante, sec. 473.

§ 390. Actions against fire departments. Causes of action upon contract, or for damages arising out of, or pertaining or incident to, the official administration of the fire departments created by acts of the legislature of this state, shall be brought directly by and against the municipality by its corporate name wherein the damage was sustained. And the said boards of fire commissioners shall not be sued as such, except to compel or restrain the performance of acts proper to be compelled or restrained under and not within the discretion intended to be conferred by this act. En. Stats. 1885, 92.

TITLE IV.

OF THE PLACE OF TRIAL OF CIVIL ACTIONS.

- § 392. Certain actions to be tried where the subject or some part thereof is situated.
- § 393. Other actions, where the cause or some part thereof arose.
- § 394. Place of trial of actions against counties.
- § 395. Other actions according to the residence of the parties.
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- § 397. Place of trial may be changed in certain cases.
- § 398. When judge is disqualified, cause to be transferred.
- § 399. Persons to be transmitted. Costs, etc. Jurisdiction, etc.
- § 400. Proceedings after judgment in certain cases transferred.

Gen. Cit. to Chap.—Cal. Rep. Cit. 54, 188.

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§ 392. Certain actions to be tried where the subject or some part thereof is situated. Actions for the following causes must be tried in the county in which the subject of the action, or some part thereof is situated, subject to the power of the court to change the place of trial, as provided in this code:

1. For the recovery of real property, or of an estate or

interest therein, or for the determination, in any form of such right or interest, and for injuries to real property.

2. For partition of real property.

3. For the foreclosure of all liens and mortgages on real property. Where the real property is situated partly in one county and partly in another, the plaintiff may select either of the counties, and the county so selected is the proper county for the trial of such action; provided, that in the case mentioned in this subdivision, if the plaintiff prays in his complaint for an injunction pending the action, or applies pending the action, for an injunction, the proper county for the trial shall be the county in which the defendant resides or a majority of the defendants reside at the commencement of the action. En. March 11, 1872. Am'd. 1875-6, 90; 1889, 352.

Cal. Rep. Cit. 51, 567; 54, 187; 56, 175; 60, 410; 61, 78; 63, 500; 73, 184; 86, 97; 86, 105; 86, 200; 88, 575; 88, 576; 88, 577; 101, 461; 102, 335; 105, 141; 106, 58; 108, 222; 113, 610; 115, 250; 129, 278; 133, 59; 133, 60; 136, 636; 138, 70; 138, 581; 140, 135; 140, 472; 140, 473; 144, 74; 147, 474. Subd. 1—66, 344; 77, 131; 79, 606; 80, 309; 83, 184; 100, 16; 102, 335; 129, 278; 134, 587; 144, 773. Subd. 3—125, 314.

Prac. Act, sec. 18. En. April 29, 1851. Am'd. 1861, 494.

Cal. Rep. Cit. 15, 221; 16, 433; 26, 187.

Riot, actions for damages caused by, must be tried in the county in which the property injured is situated: Pol. Code, sec. 4453.

§ 393. Other actions, where the cause or some part thereof arose. Actions for the following causes must be tried in the county where the cause, or some part thereof, arose, subject to the like power of the court to change the place of trial:

1. For the recovery of a penalty or forfeiture imposed by statute; except that, when it is imposed for an offense committed on a lake, river, or other stream of water, situated in two or more counties, the action may be brought in any county bordering on such lake, river, or stream, and opposite to the place where the offense was committed;

2. Against a public officer, or person especially appointed to execute his duties, for an act done by him in virtue of his office; or against a person who, by his command or in

his aid, does anything touching the duties of such officer. En. March 11, 1872.

Cal. Rep. Cit. 61, 78; 61, 79; 63, 500; 79, 31; 105, 141; 113, 610; 115, 250; 115, 302; 138, 581.

Prac. Act, sec. 19. En. April 29, 1851.

Cal. Rep. Cit. 9, 420; 10, 19; 15, 221.

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§ 394. Place of trial of actions against counties. An action against a county or city and county may be commenced and tried in such county or city and county unless such action is brought by a county or city and county, in which case it may be commenced and tried in any county or city and county not a party thereto; provided further, that whenever an action is brought by a county or city against citizens of another county, or a corporation doing business in the latter, the action must be, on the motion of the defendant, transferred for trial to a county other than the plaintiff, if the plaintiff be a county, and other than that in which the plaintiff is situated, if the plaintiff be a city. En. March 11, 1872. Am'd. 1881, 23; 1891, 56.

Cal. Rep. Cit. 61, 78; 102, 49; 115, 250; 136, 136; 136, 137; 138, 580; 138, 581; 138, 582.

Actions against cities for injuries from mobs: See Pol. Code, sec. 4453.

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§ 395. Other actions according to the residence of the parties. In all other cases, the action must be tried in the county in which the defendants, or some of them reside at the commencement of the action; or, if none of the defendants reside in the state, or, if residing in this state, and the county in which they reside is unknown to the plaintiff, the same may be tried in any county which the plaintiff may designate in his complaint; and if the defendant is about to depart from the state, such action may be tried in any county where either of the parties reside or service is had; subject, however, to the power of the court to change the place of trial, as provided in this code. En. March 11, 1872.

Cal. Rep. Cit. 61, 78; 62, 319; 65, 394; 65, 395; 65, 602; 69, 154; 71, 489; 77, 132; 77, 449; 80, 563; 80, 564; 83, 497; 88, 575; 88, 576; 88, 577; 88, 578; 92, 200; 97, 139; 97, 140; 97, 643; 100, 15; 100, 16; 101, 460; 102, 48; 102, 336; 105, 141; 106, 58; 111, 376; 113, 609;

113, 610; 115, 250; 119, 79; 119, 80; 133, 59; 133, 60; 133, 507; 135, 155; 135, 574; 136, 136; 136, 137; 136, 138; 138, 580; 138, 581; 139, 715; 139, 716; 140, 472; 140, 473; 144, 774.

Prac. Act, sec. 20. En. April 29, 1851. Am'd. 1858, 82.

Cal. Rep. Cit. 9, 420; 13, 73; 15, 221; 22, 538; 26, 187; 71, 489.

Changing venue in criminal actions: See Pen. Code, secs. 1033, 1034.

§ 396. Action may be tried in any county, unless the defendant demand a trial in the proper county. If the county in which the action is commenced is not the proper county for the trial thereof, the action may, notwithstanding, be tried therein, unless the defendant, at the time he appears and answers or demurs, files an affidavit of merits, and demands, in writing, that the trial be had in the proper county. En. March 11, 1872. §39 Am' p. 4

Cal. Rep. Cit. 54, 407; 57, 348; 61, 75; 61, 78; 62, 319; 63, 501; 64, 299; 65, 321; 66, 37; 69, 154; 69, 155; 79, 33; 80, 561; 80, 563; 83, 497; 92, 201; 94, 398; 97, 137; 97, 138; 100, 17; 121, 606; 133, 60; 134, 589; 135, 579; 136, 363; 139, 716; 139, 717.

§ 397. Place of trial may be changed in certain cases. The court may, on motion, change the place of trial in the following cases:

1. When the county designated in the complaint is not the proper county; §39 Am' p. 43
2. When there is reason to believe that an impartial trial cannot be had therein;
3. When the convenience of witnesses, and the ends of justice would be promoted by the change;
4. When from any cause the judge is disqualified from acting. En. March 11, 1872.

Cal. Rep. Cit. 56, 328; 56, 330; 61, 75; 79, 50; 100, 15; 133, 60. Subd. 1—144, 774. Subd. 4—100, 320; 103, 398; 104, 604; 104, 605.

Prac. Act, sec. 21. En. April 29, 1851.

Cal. Rep. Cit. 15, 221; 24, 77.

Appeal—from order as to change of venue: Post, sec. 399, subd. 3.

Judge, when disqualified: See ante, sec. 170.

Mandamus and prohibition—Controlling action of court on motion to change the place of trial by resort to these writs: See secs. 1085, 1102, post.

§ 398. When judge is disqualified, cause to be transferred. If an action or proceeding is commenced or pending in a court, and the judge or justice thereof is disqualified from acting as such, or if, from any cause, the court orders the place of trial changed, it must be transferred for trial to a court the parties may agree upon, by stipulation in writing, or made in open court and entered in the minutes; or, if they do not so agree, then to the nearest or most accessible court where the like objection or cause for making the order does not exist, as follows:

1. If in a superior court, to another superior court.
2. If in a justice's court, to another justice's court in the same county. En. March 11, 1872. Am'd. 1881, 23; 1897, 184.

Cal Rep. Cit. 59, 131; 61, 216; 64, 300; 67, 331; 94, 27; 94, 28; 98, 119; 98, 362; 100, 320; 128, 570.

§ 399. Papers to be transmitted. Costs, etc. Jurisdiction, etc. When an order is made transferring an action or proceeding for trial, the clerk of the court, or justice of the peace, must transmit the pleadings and papers therein to the clerk or justice of the court to which it is transferred. The costs and fees thereof, and of filing the papers anew, must be paid by the party at whose instance the order was made. The court to which an action or proceeding is transferred has and exercises over the same the like jurisdiction as if it had been originally commenced therein. En. March 11, 1872.

Cal. Rep. Cit. 133, 363; 136, 138; 142, 357.

Costs on removal of criminal action chargeable against county: See Pol. Code, secs. 4345-4347.

§ 400. Proceedings after judgment in certain cases transferred. When an action or proceeding affecting the title to or possession of real estate has been brought in or transferred to any court of a county other than the county in which the real estate, or some portion of it, is situated, the clerk of such court must, after final judgment therein, certify under his seal of office, and transmit to the corresponding court of the county in which the real estate affected by the action is situated, a copy of the judgment. The clerk receiving such copy must file, docket, and record the judgment in the record of the court, briefly designating it as a judgment transferred from — court (naming the proper court). En. March 11, 1872.

TITLE V.

OF THE MANNER OF COMMENCING CIVIL ACTIONS.

- § 405. Actions, how commenced.
- § 406. Complaint, how indorsed. When summons may be issued, and how waived.
- § 407. Summons, how issued, directed, and what to contain.
- § 408. Alias summons.
- § 409. Notice of the pendency of an action affecting the title to real property.
- § 410. Summons, how served and returned.
- § 411. Summons, how served.
- § 412. Publication when defendant is absent from the state, concealed, or a foreign corporation having no agent, etc.
- § 413. Manner of publication.
- § 414. Proceedings where there are several defendants, and part only are served.
- § 415. Proof of service, how made.
- § 416. When jurisdiction of action acquired.

§ 405. Actions, how commenced. Civil actions in the courts of this state are commenced by filing a complaint En. ~~March 11, 1872~~ Am'd. 1873-4, 296.

Cal. Rep. Cit. 59, 473; 69, 526; 79, 585; 99, 205; 140, 266.

Prac. Act, sec. 22. En. April 29, 1851. Am'd. 1855, 303.

Cal. Rep. Cit. 6, 321; 19, 577; 20, 82; 21, 54; 29, 238; 29, 239; 35, 299; 35, 301; 44, 160; 138, 218.

§ 406. Complaint, how indorsed. When summons may be issued, and how waived. The clerk must indorse on the complaint the day, month, and year that it is filed, and at any time within one year thereafter, the plaintiff may have a summons issued, and if the action be brought against two or more defendants who reside in different counties, may have a summons issued for each of such counties at the same time. But at any time within the year after the complaint is filed, the defendant may, in writing, or by appearing and answering or demurring, waive the issuing of summons; or, if the action be brought upon a joint contract of two or more defendants, and one of them has appeared within the year, the other or others, may be served or appear after the year, at any time before trial. En. March 11, 1872. Am'd. 1873-4, 296.

Cal. Rep. Cit. 53, 246; 69, 526; 99, 339; 100, 513; 101, 641; 116, 450; 125, 300; 132, 83.

Prac. Act, sec. 23. En. April 29, 1851. Am'd. 1860, 298.
Cal. Rep. Cit. 29, 239; 34, 166; 35, 301.

Admission of service by defendant: Post, sec. 415.

Alias summons: Post, sec. 402.

Appearance: Post, secs. 416, 1014.

§ 407. **Summons, how issued, directed, and what to contain.** The summons must be directed to the defendant, signed by the clerk, and issued under the seal of the court, and must contain:

1. The names of the parties to the action, the court in which it is brought and the county in which the complaint is filed;

2. A direction that the defendant appear and answer the complaint within ten days, if the summons is served within the county in which the action is brought; within thirty days, if served elsewhere;

3. A notice that, unless the defendant so appears and answers, the plaintiff will take judgment for any money or damages demanded in the complaint as arising upon contract, or will apply to the court for any other relief demanded in the complaint. En. March 11, 1872. Am'd. 1880, 13; 1897, 53.

Cal. Rep. Cit. 52, 578; 53, 254; 58, 189; 59, 141; 65, 98; 67, 397; 76, 611; 104, 490; 128, 635; 133, 416; 133, 417; Subd. 3—122, 270. Subd. 4—91, 145; 122, 270. Subd. 5—90, 506; 122, 270; 143, 14.

Prac. Act, sec. 24. En. April 29, 1851. Am'd. 1854, 59; 1859, 39.

Cal. Rep. Cit. 1, 96; 32, 353; 41, 317; 44, 633.

Prac. Act, sec. 25. En. April 29, 1851.

Cal. Rep. Cit. 2, 274; 5, 466; 32, 353; 44, 360.

Prac. Act, sec. 26. En. April 29, 1851.

Style of process—The style of all process shall be: "The people of the State of California," and all prosecutions shall be conducted in their name and by their authority: Const. Cal., art. 6, sec. 20.

The sovereignty of the state resides in the people thereof, and all writs and processes must issue in their name: Pol. Code, sec. 30.

§ 408. **Alias summons.** If the summons is returned without being served on any or all of the defendants, or if it has been lost, the clerk, upon the demand of the plaintiff, may issue an alias summons, in the same form as the original; provided, that no such alias summons shall be issued after the expiration of one year from the date of the filing of the complaint. En. March 11, 1872. Am'd. 1875-6, 90; 1887, 50.

Cal. Rep. Cit. 99, 339; 116, 451; 117, 581; 126, 246; 137, 272; 137, 657; 141, 655; 141, 657; 141, 658.

§ 409. **Notice of the pendency of an action affecting the title to real property.** In an action affecting the title or the right of possession of real property, the plaintiff, at the time of filing the complaint, and the defendant, at the time of filing his answer, when affirmative relief is claimed in such answer, or at any time afterward, may record in the office of the recorder of the county in which the property is situated a notice of the pendency of the action, containing the names of the parties and the object of the action or defense, and a description of the property in that county affected thereby. From the time of filing such notice for record only shall a purchaser or encumbrancer of the property affected thereby be deemed to have constructive notice of the pendency of the action, and only of its pendency against parties designated by their real names. En. March 11, 1872. Am'd. 1873-4, 297.

Cal. Rep. Cit. 58, 152; 74, 265; 79, 122; 96, 304; 132, 248; 145, 581.

Prac. Act, sec. 27. En. April 29, 1851. Am'd. 1862, 572; 1871-2, 189.

Cal. Rep. Cit. 22, 210; 26, 126; 29, 134; 29, 135; 32, 295; 34, 615; 43, 263; 71, 476.

Partition—recording notice of suit: Sec. 755.

Person in possession of real property, action against, cannot be prejudiced by any alienation made by him: Sec. 747.

§ 410. **Summons, how served and returned.** The summons may be served by the sheriff of the county where the defendant is found or by any other person over the age of eighteen, not a party to the action. A copy of the complaint must be served with the summons, upon each of the defendants. When the summons is served by the sheriff, it must be returned, with his certificate of its service, and of the service of any copy of the complaint,

where such copy is served, to the office of the clerk from which it issued. When it is served by any other person, it must be returned to the same place with an affidavit of such person of its service, and of the service of a copy of the complaint, where such copy is served. En. March 11, 1872. Am'd. 1873-4, 297; 1893, 207.

Cal. Rep. Cit. 57, 355; 59, 473; 60, 11; 63, 466; 72, 74; 95, 654; 110, 31; 110, 32; 137, 657; 143, 21.

Prac. Act, sec. 28. En. April 29, 1851. Am'd. 1854, 59; 1855, 61; 1855, 196. Rep. 1855, 304. Am'd. 1859, 39; 1860, 298; 1869-70, 574.

Cal. Rep. Cit. 7, 280; 11, 378; 28, 153; 34, 404; 35, 299; 35, 301; 45, 465.

Costs, where served by person other than sheriff: See post, Appendix, Costs.

Process, how returnable to another county: See Pol. Code, sec. 4177.

Return of sheriff is prima facie evidence: See Pol. Code, sec. 4178.

Delay of sheriff in making return, liability: See Pol. Code, sec. 4179.

§ 411. **Summons, how served.** The summons must be served by delivering a copy thereof, as follows:

1. If the suit is against a corporation formed under the laws of this state: to the president or other head of the corporation, secretary, cashier, or managing agent thereof.

2. If the suit is against a foreign corporation, or a non-resident joint stock company, or association, doing business and having a managing or business agent, cashier, or secretary within this state: to such agent, cashier, or secretary.

3. If against a minor under the age of fourteen years, residing within this state: to such minor, personally, and also to his father, mother, or guardian; or, if there be none within this state, then to any person having the care or control of such minor, or with whom he resides, or in whose service he is employed.

4. If against a person residing within this state, who has been judicially declared to be of unsound mind, or incapable of conducting his own affairs, and for whom a guardian has been appointed: to such person and also to his guardian.

5. If against a county, city or town: to the president of the board of supervisors, president of the council or

trustees, or other head of the legislative department thereof.

6. In all other cases to the defendant personally. En. March 11, 1872. Am'd. 1873-4, 298.

Cal. Rep. Cit. 59, 473; 59, 493; 139, 177; 139, 178; 143, 21. Subd. 1—79, 104; 127, 68; 128, 332. Subd. 2—66, 315; 97, 397; 127, 68. Subd. 3—64, 597; 80, 499; 120, 430. Subd. 4—87, 531; 134, 633.

Prac. Act, sec. 29. En. April 29, 1851. Am'd. 1854, 59; 1861, 496.

Cal. Rep. Cit. 6, 187; 9, 637; 16, 388; 20, 82; 38, 153; 38, 154; 51, 617; 53, 741; 64, 597.

Association, service may be on one of the members of: Ante, sec. 388.

Return of summons: Post, sec. 415.

Telegraph, service by: Post, sec. 1017.

§ 412. Publication when defendant is absent from the state, concealed, or a foreign corporation having no agent, etc. Where the person on whom service is to be made resides out of the state; or has departed from the state; or cannot, after due diligence, be found within the state; or conceals himself to avoid the service of summons; or is a foreign corporation having no managing or business agent, cashier or secretary within the state, and the fact appears by affidavit to the satisfaction of the court, or a judge thereof; and it also appears by such affidavit, or by the verified complaint on file, that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a necessary or proper party to the action; or when it appears by such affidavit, or by the complaint on file herein, that it is an action which relates to or the subject of which is real or personal property in this state, in which such person defendant or foreign corporation defendant has or claims a lien or interest, actual or contingent, therein, or in which the relief demanded consists wholly or in part in excluding such person or foreign corporation from any interest therein, such court or judge may make an order that the service be made by the publication of the summons, provided that where service is sought to be made upon a person who cannot, after due diligence, be found within the state it must first appear to the court by the affidavit aforesaid that there has not been filed, on behalf of such person, in the county where such action is pending, the certificate of residence provided for by sec-

tion one thousand one hundred and sixty-three of the Civil Code in the county in which the action is brought; or that said certificate was so filed and that the defendant cannot be found at the place named in said certificate, which latter fact must be made to appear by the certificate of the sheriff of the county wherein said defendant claims residence in and by said certificate of residence, and which certificate of said sheriff must show that service of said summons was attempted upon said defendant at the place named in said certificate of residence but that said defendant was not to be found thereat. En. March 11, 1872. Am'd. 1880, 13; 1893, 285; 1905, 141.

Cal. Rep. Cit. 64, 597; 67, 19; 68, 87; 70, 433; 70, 436; 72, 68; 73, 600; 76, 611; 76, 612; 76, 614; 76, 647; 86, 583; 86, 584; 92, 346; 92, 355; 99, 325; 101, 573; 109, 254; 115, 277; 119, 301; 137, 426; 137, 655; 138, 446; 144, 415; 144, 787.

Prac. Act, sec. 30. En. April 29, 1851.

Cal. Rep. Cit. 5, 466; 20, 82; 26, 152; 26, 154; 31, 351; 64, 597.

§ 413. **Manner of publication.** The order must direct the publication to be made in a newspaper to be designated, as most likely to give notice to the person to be served, and not for such length of time as may be deemed reasonable, at least once a week; but publication against a defendant residing out of the state, or absent therefrom, must not be less than two months. In case of publication, where the residence of a nonresident or absent defendant is known, the court or judge must direct a copy of the summons and complaint to be forthwith deposited in the postoffice, directed to the person to be served, at his place of residence. When publication is ordered, personal service of a copy of the summons and complaint out of the state is equivalent to publication and deposit in the postoffice, and in either case the service of the summons is complete at the expiration of the time prescribed by the order for publication. En. March 11, 1872. Am'd. 1873-4, 299.

Cal. Rep. Cit. 67, 19; 68, 87; 72, 68; 72, 72; 76, 614; 86, 583; 92, 355; 101, 249; 133, 460; 137, 426; 144, 423; 144, 424; 144, 490.

Prac. Act, sec. 31. En. April 29, 1851. Am'd. 1869-70, 511; 1871-2, 190.

Cal. Rep. Cit. 1, 176; 5, 466; 6, 184; 12, 102; 26, 152; 26, 154; 31, 351; 32, 350; 33, 514; 34, 404.

Publication, proof of: Post, secs. 2010, 2011.

Judgment by default: Post, sec. 585, subd. 3.

§ 414. Proceedings where there are several defendants, and part only are served. When the action is against two or more defendants, jointly or severally liable on a contract, and the summons is served on one or more but not on all of them, the plaintiff may proceed against the defendants served in the same manner as if they were the only defendants. En. March 11, 1872.

Cal. Rep. Cit. 58, 607; 67, 146; 67, 147; 68, 426; 68, 427; 68, 428; 69, 458; 69, 621; 70, 114; 70, 405; 73, 391; 75, 593; 94, 299; 103, 207; 125, 270; 136, 302; 136, 575; 144, 4.

Prac. Act, sec. 32. En. April 29, 1851.

Cal. Rep. Cit. 6, 183; 12, 351; 17, 566; 39, 95; 50, 532; 67, 146; 68, 426; 68, 427.

Joining persons severally liable upon instruments: Ante, sec. 383.

Judgment against some defendants, proceedings continuing against the others: Post, sec. 579.

Joint debtors, proceedings against, after judgment against some: Post, secs. 989 et seq.

§ 415. Proof of service, how made. Proof of the service of summons and complaint must be as follows:

1. If served by the sheriff, his certificate thereof;
2. If by any other person, his affidavit thereof; or,
3. In case of publication, the affidavit of the printer, or his foreman or principal clerk, showing the same; and an affidavit of a deposit of a copy of the summons in the postoffice, if the same has been deposited; or,
4. The written admission of the defendant.

In case of service otherwise than by publication, the certificate or affidavit must state the time and place of service. En. March 11, 1872.

Cal. Rep. Cit. 128, 332. Subd. 1—59, 493. Subd. 3—72, 74; 73, 600; 93, 607; 101, 573; 119, 301; 134, 623.

Prac. Act, sec. 33. En. April 29, 1851.

Cal. Rep. Cit. 11, 314; 33, 512; 33, 514; 34, 404; 34, 425, 34, 430.

Prac. Act, sec. 34. En. April 29, 1851.

Cal. Rep. Cit. 34, 404; 45, 463.

§ 416. When jurisdiction of action acquired. From the time of the service of the summons and of a copy of the

complaint in a civil action, where service of a copy of the complaint is required, or of the completion of the publication when service by publication is ordered, the court is deemed to have acquired jurisdiction of the parties, and to have control of all the subsequent proceedings. The voluntary appearance of a defendant is equivalent to personal service of the summons and copy of the complaint upon him. En. March 11, 1872. Am'd. 1873-4, 299.

Cal. Rep. Cit. 56, 629; 59, 473; 60, 299; 64, 598; 75, 220; 75, 239; 84, 29; 87, 152; 92, 355; 99, 205; 103, 522; 117, 581; 122, 450; 125, 300; 133, 71; 141, 657; 144, 30.

Prac. Act, sec. 35. En. April 29, 1851.

Cal. Rep. Cit. 1, 372; 6, 296; 9, 111; 45, 463.

Admission of service: Ante, sec. 415.

Appearance: Post, sec. 1014.

Waiver of summons: Ante, sec. 406.

TITLE VI.

OF THE PLEADINGS IN CIVIL ACTIONS.

Chapter I. The Pleadings in General, §§ 420-422.

II. The Complaint, §§ 425-427.

III. Demurrer to the Complaint, §§ 430-434.

IV. The Answer, §§ 437-442.

V. Demurrer to Answer, §§ 443, 444.

VI. Verification of Pleadings, §§ 446-449.

VII. General Rules of Pleading, §§ 452-465.

VIII. Variance—Mistakes in Pleadings and Amendments, §§ 469-476.

CHAPTER I.

THE PLEADINGS IN GENERAL.

§ 420. Definition of pleadings.

§ 421. This code prescribes the form and rules of pleadings.

§ 422. What pleadings are allowed.

§ 420. Definition of pleadings. The pleadings are the formal allegations by the parties of their respective claims and defenses for the judgment of the court. En. March 11, 1872.

Cal. Rep. Cit. 71, 522; 117, 240.

Prac. Act, sec. 36. En. April 29, 1851.

§ 421. This code prescribes the form and rules of pleadings. The forms of pleading in civil actions, and the rules by which the sufficiency of the pleadings is to be determined are those prescribed by this code. En. March 11, 1872.

Cal. Rep. Cit. 83, 397; 114, 475; 139, 474.

Prac. Act, sec. 37. En. April 29, 1851.

Cal. Rep. Cit. 9, 467; 9, 475; 16, 243; 24, 95.

One form of actions: Ante, sec. 307.

Rules of pleading, generally: Post, secs. 452 et seq.

§ 422. What pleadings are allowed. The only pleadings allowed on the part of the plaintiff are:

1. The complaint;

2. The demurrer to the answer.

And on the part of the defendant:

1. The demurrer to the complaint;

2. The answer. En. March 11, 1872.

Cal. Rep. Cit. 56, 325; 114, 475.

Prac. Act, sec. 38. En. April 29, 1851. Am'd. 1855, 303; 1860, 298; 1863, 578; 1866, 701.

Cal. Rep. Cit. 1, 174; 5, 125; 34, 27; 34, 28; 38, 585; 39, 177; 77, 226.

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CHAPTER II.

THE COMPLAINT.

§ 425. Complaint, first pleading.

§ 426. Complaint, what to contain.

§ 427. What causes of action may be joined.

§ 425. Complaint, first pleading. The first pleading on the part of the plaintiff is the complaint. En. March 11, 1872.

§ 426. Complaint, what to contain. The complaint must contain:

1. The title of the action, the name of the court and county in which the action is brought, and the names of the parties to the action;

2. A statement of the facts constituting the cause of action, in ordinary and concise language;

3. A demand of the relief which the plaintiff claims. If the recovery of money or damages be demanded, the amount thereof must be stated. En. March 11, 1872.

Cal. Rep. Cit. 79, 585; 124, 836. Subd. 2—51, 545; 63, 427; 77, 413; 81, 121; 83, 397; 93, 57; 94, 174; 99, 418; 126, 634; 139, 474. Subd. 3—99, 244.

Prac. Act, sec. 39. En. April 29, 1851.

Cal. Rep. Cit. 1, 96; 7, 261; 25, 89; 37, 253; 37, 303; 40, 491.

Title, papers defectively entitled: Post, sec. 1046.

Venue: Ante, secs. 392-400.

Parties: Ante, secs. 367-390.

Parties, misjoinder or nonjoinder: Post, sec. 430.

Association may be sued under common name: Ante, sec. 388.

Intervention: Ante, sec. 387.

Fictitious names for defendants: Post, sec. 474.

Abbreviations and numerals: Ante, sec. 186.

Construction of pleadings to be liberal: Post, sec. 452.

Errors and defects to be disregarded: Post, sec. 475.

Material allegations not controverted taken as true:

Post, sec. 462.

Service of complaint: Ante, sec. 410.

Several causes of action, uniting: Post, sec. 427.

Pleading, in particular cases: See Particular Title.

Amendment of pleadings: Post, secs. 472, 473; of complaint: Post, sec. 432.

As to effect of setting out written instrument if its genuineness is not denied on oath: Post, secs. 447-449.

Variance: Post, secs. 469 et seq.

Gold coin, allegations to obtain judgment in: Post, sec. 667.

Supplemental complaint: Post, sec. 464.

Verification of pleadings: Post, sec. 446.

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§ 427. What causes of action may be joined. The plaintiff may unite several causes of action in the same complaint, where they all arise out of:

1. Contracts, express or implied;

2. Claims to recover specific real property, with or without damages for the withholding thereof, or for waste committed thereon, and the rents and profits of the same;

3. Claims to recover specific personal property, with or without damages for the withholding thereof;

4. Claims against a trustee by virtue of a contract or by operation of law;

5. Injuries to character;

6. Injuries to person;

7. Injuries to property;

The causes of action so united must all belong to one only of these classes, and must affect all the parties to the action, and not require different places of trial, and must be separately stated; but an action for malicious arrest and prosecution, or either of them, may be united with the action for either an injury to character or to the person. En. March 11, 1872.

Cal. Rep. Cit. 51, 491; 65, 488; 73, 190; 80, 324; 83, 400; 90, 76; 96, 401; 96, 402; 100, 373; 102, 510; 105, 689; 109, 209; 135, 560; 137, 649. Subd. 1—88, 541; 92, 102; 104, 640. Subd. 2—65, 162; 72, 329. Subd. 4—71, 188; 71, 189; 125, 234; 140, 50; 146, 56.

Prac. Act, sec. 64. En. April 29, 1851. Am'd. 1855, 196.

Cal. Rep. Cit. 1, 192; 3, 206; 15, 152; 22, 462; 28, 488; 28, 639; 31, 496; 32, 342; 36, 283; 46, 171; 50, 654.

CHAPTER III.

DEMURRER TO THE COMPLAINT.

§ 430. When defendant may demur.

§ 431. Demurrer must specify, etc. May be taken to part. May answer and demur at same time.

§ 432. What proceedings are to be had when complaint amended.

§ 433. Objection not appearing on complaint, may be taken by answer.

§ 434. Objections, when deemed waived.

§ 430. When defendant may demur. The defendant may demur to the complaint within the time required in the summons to answer, when it appears upon the face thereof, either:

1. That the court has no jurisdiction of the person of the defendant, or the subject of the action; or,

2. That the plaintiff has not legal capacity to sue; or,

3. That there is another action pending between the same parties for the same cause; or,

4. That there is a defect or misjoinder of parties plaintiff or defendant; or,

5. That several causes of action have been improperly united; or,

6. That the complaint does not state facts sufficient to constitute a cause of action; or,

7. That the complaint is ambiguous, unintelligible, or uncertain. En. March 11, 1872.

Cal. Rep. Cit. 54, 292; 76, 43; 77, 311; 98, 417; 118, 224; 118, 239; 124, 83; 125, 111; 136, 614. Subd. 2—66, 59; 144, 364; 146, 180; 146, 181. Subd. 4—95, 133; 110, 289; 110, 460. Subd. 5—90, 76; 102, 509; 110, 487. Subd. 6—68, 59. Subd. 7—82, 212; 87, 458; 121, 171; 123, 88; 137, 153.

Prac. Act, sec. 40. En. April 29, 1851. Am'd. 1859, 139.

Cal. Rep. Cit. 1, 174; 1, 395; 4, 313; 6, 165; 7, 334; 8, 369; 8, 517; 8, 590; 25, 89; 32, 119; 32, 342; 43, 184.

General and special demurrer: See sec. 431, *infra*.

Demurring and answering at same time: Post, secs. 431, 441.

Serving demurrer: Post, sec. 465.

Judgment on demurrer: Post, sec. 636.

431 m'd. Demurrer is an appearance: Post, sec. 1014.

439 Waiving objections by not demurring: Post, sec. 434.

§ 431. Demurrer must specify, etc. May be taken to part. May answer and demur at same time. The demurrer must distinctly specify the grounds upon which any of the objections to the complaint are taken. Unless it do so, it may be disregarded. It may be taken to the whole complaint or to any of the causes of action stated therein, or the defendant may demur and answer at the same time. En. March 11, 1872.

Cal. Rep. Cit. 96, 493; 118, 420; 133, 310.

Prac. Act, sec. 41. En. April 29, 1851.

Cal. Rep. Cit. 25, 89; 25, 90; 25, 91; 25, 92; 26, 154; 30, 673.

Prac. Act, sec. 42. En. April 29, 1851.

Cal. Rep. Cit. 1, 174; 38, 541.

§ 432. What proceedings are to be had when complaint amended. If the complaint is amended, a copy of the amendments must be filed, or the court may, in its dis-

cretion, require the complaint, as amended, to be filed, and a copy of the amendments, or amended complaint, must be served upon the defendants affected thereby. The defendant must answer the amendments or the complaint, as amended, within ten days after service thereof, or such other time as the court may direct, and judgment by default may be entered upon failure to answer, as in other cases. En. March 11, 1872. Am'd. 1880, 2.

Cal. Rep. Cit. 58, 45; 58, 94; 60, 295; 60, 405; 72, 88; 90, 61; 99, 205; 99, 206; 137, 676; 146, 182.

Prac. Act, sec. 43. En. April 29, 1851. Am'd. 1854, 60; 1855, 196.

Cal. Rep. Cit. 1, 174; 1, 395.

Amendment—generally: Post, secs. 472, 473.

§ 433. Objection not appearing on complaint, may be taken by answer. When any of the matters enumerated in section 430 do not appear upon the face of the complaint, the objection may be taken by answer. En. March 11, 1872.

Cal. Rep. Cit. 60, 405; 66, 517; 87, 460; 92, 88; 95, 133; 110, 460; 121, 571; 130, 520.

Prac. Act, sec. 44. En. April 29, 1851.

Cal. Rep. Cit. 1, 175; 1, 395; 4, 313; 6, 165; 7, 334; 8, 590; 25, 89; 25, 91; 31, 420; 36, 126; 47, 221, 144, 364; 146, 181.

§ 434. Objections, when deemed waived. If no objection be taken, either by demurrer or answer, the defendant must be deemed to have waived the same, excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action. En. March 11, 1872.

Cal. Rep. Cit. 59, 516; 66, 59; 69, 157; 70, 78; 70, 405; 74, 153; 77, 392; 78, 256; 82, 525; 92, 88; 95, 133; 95, 579; 96, 611; 101, 641; 103, 445; 110, 289; 110, 337; 110, 460; 110, 487; 121, 571; 124, 130; 134, 412; 136, 614; 137, 306; 139, 55; 142, 70; 144, 364; 145, 185; 147, 694.

Prac. Act, sec. 45. En. April 29, 1851.

Cal. Rep. Cit. 1, 195; 1, 372; 4, 313; 7, 334; 8, 517; 8, 590; 21, 635; 22, 629; 25, 88; 25, 90; 30, 673; 31, 420; 32, 342; 33, 656; 36, 126.

CHAPTER IV.

THE ANSWER.

§ 437. Answer, what to contain.

§ 438. When counterclaim may be set up.

§ 439. When defendant omits to set up counterclaim.

§ 440. Counterclaim not barred by death or assignment.

§ 441. Answer may contain several grounds of defense.

Defendant may answer part and demur to part of complaint.

§ 442. Cross-complaint.

§ 437. Answer, what to contain. The answer of the defendant shall contain:

1. A general or specific denial of the material allegations of the complaint controverted by the defendant.

2. A statement of any new matter constituting a defense or counterclaim. If the complaint be verified, the denial of each allegation controverted must be specific, and be made positively, or according to the information and belief of the defendant. If the defendant has no information or belief upon the subject sufficient to enable him to answer an allegation of the complaint, he may so state in his answer, and place his denial on that ground. If the complaint be not verified, a general denial is sufficient, but only puts in issue the material allegations of the complaint. En. March 11, 1872. Am'd. 1873-4, 300.

Cal. Rep. Cit. 65, 324; 65, 385; 92, 180; 94, 174; 98, 646; 100, 488; 119, 433; 119, 472; 129, 50. Subd. 1—139, 378; 143, 133. Subd. 2—89, 445; 99, 87; 100, 486; 118, 690; 119, 471; 121, 271; 126, 293; 128, 328; 132, 11; 133, 71; 138, 722.

Prac. Act, sec. 46. En. April 29, 1851. Am'd. 1854, 60; 1860, 298; 1862, 562; 1866, 702.

Cal. Rep. Cit. 6, 200; 8, 149; 8, 369; 9, 38; 9, 62; 18, 314; 19, 658; 21, 435; 25, 89; 26, 306; 27, 371; 32, 629; 33, 211; 35, 280; 38, 585; 39, 177.

Pleas in abatement: See ante, sec. 430.

Amendment: Ante, secs. 472, 473.

Appearance, answering is: Post, sec. 1014.

Counterclaim: Post, secs. 438-441.

Cross-complaint: Post, sec. 442.

Death of party: Ante, sec. 385.

Disability of party: Ante, sec. 385.

Errors and defects to be disregarded: Post, sec. 475.

Gold coin, etc., allegations as to money being payable in, should be denied: Post, sec. 667.

Striking out: Post, sec. 453.

Supplemental answer: Post, sec. 464.

Time to answer—extension of: Post, sec. 1054.

Writing—Setting forth in answer, effect of: Post, secs. 448, 449.

Particular actions, answers in: See Particular Title.

§ 438. When counterclaim may be set up. The counterclaim mentioned in the last section must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action, and arising out of one of the following causes of action:

1. A cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action;

2. In an action arising upon contract; any other cause of action arising also upon contract, and existing at the commencement of the action. En. March 11, 1872.

Cal. Rep. Cit. 51, 540; 57, 647; 65, 324; 65, 326; 69, 618; 70, 112; 72, 226; 72, 227; 87, 266; 96, 91; 101, 290; 104, 135; 107, 67; 110, 264; 110, 266; 113, 440; 116, 96; 119, 472; 119, 474; 126, 293; 126, 295; 132, 161; 140, 498; 142, 420. Subd. 1—53, 32; 67, 590; 70, 113; 100, 34; 110, 263; 120, 413; 125, 49; 129, 479; 135, 40; 137, 338; 140, 498; 142, 421. Subd. 2—51, 226; 58, 354; 64, 274; 64, 491; 101, 649; 118, 337; 119, 471; 120, 28; 120, 413; 125, 49; 126, 293; 143, 255.

Prac. Act, sec. 47. En. April 29, 1851. Am'd. 1860, 299.

Cal. Rep. Cit. 8, 405; 19, 658; 30, 252; 35, 280; 39, 177; 39, 178; 39, 392; 50, 654.

Dismissing action where counterclaim: Post, sec. 581.

Omission to set up counterclaim prevents future action thereon: Post, sec. 439.

Compensated, cross-demands deemed: Post, sec. 440.

§ 439. When defendant omits to set up counterclaim. If the defendant omit to set up a counterclaim in the cases mentioned in the first subdivision of the last section, neither he nor his assignee can afterward maintain an action against the plaintiff therefor. En. March 11, 1872.

Cal. Rep. Cit. 58, 611; 129, 479; 135, 41. Subd. 3.—130, 520.

§ 440. Counterclaim not barred by death or assignment. When cross-demands have existed between persons under

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such circumstances that, if one had brought an action against the other, a counterclaim could have been set up, the two demands shall be deemed compensated, so far as they equal each other, and neither can be deprived of the benefit thereof by the assignment or death of the other. En. March 11, 1872. Am'd. 1873-4, 300.

Cal. Rep. Cit. 43, 146; 65, 324; 107, 62; 107, 67; 110, 266; 118, 341; 119, 474; 126, 293; 126, 295; 136, 628.

Prac. Act, sec. 48. En. April 29, 1851.

§ 441. Answer may contain several grounds of defense. Defendant may answer part and demur to part of complaint. The defendant may set forth by answer as many defenses and counterclaims as he may have. They must be separately stated, and the several defenses must refer to the causes of action which they are intended to answer, in a manner by which they may be intelligibly distinguished. The defendant may also answer one or more of the several causes of action stated in the complaint, and demur to the residue. En. March 11, 1872.

Cal. Rep. Cit. 92, 180; 115, 316; 121, 171; 121, 417; 129, 651.

Prac. Act, sec. 49. En. April 29, 1851.

Cal. Rep. Cit. 22, 677; 28, 387; 43, 268.

442 § 442. Cross-complaint. Whenever the defendant seeks
n'd. affirmative relief against any party, relating to or depend-
439 ing upon the contract or transaction upon which the ac-
tion is brought, or affecting the property to which the ac-
tion relates, he may, in addition to his answer, file at
the same time, or by permission of the court subsequently,
a cross-complaint. The cross-complaint must be served
upon the parties affected thereby, and such parties may
demur or answer thereto as to the original complaint. En.
Stats. 1873-4, 301.

Cal. Rep. Cit. 57, 589; 57, 593; 57, 647; 58, 239; 64, 514;
68, 280; 69, 618; 69, 619; 71, 149; 74, 492; 81, 188;
82, 416; 83, 599; 84, 587; 84, 589; 87, 153; 87, 264;
91, 554; 109, 110; 110, 152; 112, 651; 120, 57; 120, 58;
122, 249; 125, 660; 126, 60; 126, 318; 126, 594; 127, 615;
127, 617; 127, 621; 130, 44; 135, 44; 136, 315; 136, 509;
136, 535; 138, 317; 140, 498; 141, 474; 142, 206; 142,
420; 142, 421; 144, 729; 145, 570.

Original complaint: Secs. 426, 427.

Dismissing action, where cross-complaint: Post, sec. 581.

CHAPTER V.

DEMURRER TO ANSWER.

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§ 443. When plaintiff may demur to answer.

§ 444. Grounds of demurrer.

§ 443. When plaintiff may demur to answer. The plaintiff may, within the same length of time after service of the answer as the defendant is allowed to answer after service of summons, demur to the answer of the defendant, or to one or more of the several defenses or counterclaims set up in the answer. En. March 11, 1872. Am'd. 1873-4, 301.

Cal. Rep. Cit. 109, 443; 110, 152; 119, 529.

Prac. Act, sec. 50. En. April 29, 1851. Am'd. 1854, 60; 1860, 299; 1862, 562; 1866, 702.

Cal. Rep. Cit. 18, 387; 28, 297; 30, 564; 34, 161; 38, 585; 98, 417.

Demurrer to complaint: Ante, sec. 430.

Service of demurrer: Post, sec. 465.

Time to demur, extending: Post, sec. 1054.

Time to answer when demurrer overruled begins to run from service of notice of decision: Post, sec. 476.

§ 444. Grounds of demurrer. The demurrer may be taken upon one or more of the following grounds:

1. That several causes of counterclaim have been improperly joined;

2. That the answer does not state facts sufficient to constitute a defense or counterclaim;

3. That the answer is ambiguous, unintelligible, or uncertain. En. March 11, 1872.

Cal. Rep. Cit. 68, 329; 87, 405; 119, 529.

Grounds of demurrer: Ante, sec. 430.

Code Civil Proc.—11.

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CHAPTER VI.

VERIFICATION OF PLEADINGS.

§ 446. Verification of pleadings.

§ 447. Copy of written instrument contained in complaint admitted, unless answer is verified.

§ 448. When defense is founded on written instrument set out in answer, its execution admitted, unless denied by plaintiff, under oath.

§ 449. Exceptions to rules prescribed by two preceding sections.

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§ 446. Verification of pleadings. Every pleading must be subscribed by the party or his attorney; and when the complaint is verified, or when the state, or any officer of the state, in his official capacity, is plaintiff, the answer must be verified, unless an admission of the truth of the complaint might subject the party to a criminal prosecution, or, unless an officer of the state, in his official capacity, is defendant. In all cases of a verification of a pleading, the affidavit of the party must state that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true; and where a pleading is verified, it must be by the affidavit of a party, unless the parties are absent from the county, where the attorney resides, or from some cause unable to verify it, or the facts are within the knowledge of his attorney or other person verifying the same. When the pleading is verified by the attorney, or any other person except one of the parties, he must set forth in the affidavit the reasons why it is not made by one of the parties. When a corporation is a party, the verification may be made by any officer thereof. En. March 11, 1872.

Cal. Rep. Cit. 52, 182; 58, 40; 58, 41; 60, 375; 65, 337; 65, 338; 68, 410; 72, 88; 78, 121; 80, 60; 83, 562; 98, 33; 106, 579; 113, 171; 114, 475; 124, 115; 128, 328; 128, 584; 138, 158; 138, 447; 147, 494.

Prac. Act, sec. 51. En. April 29, 1851. Am'd. 1860, 299; 1862, 562.

Cal. Rep. Cit. 9, 423.

Prac. Act, sec. 52. En. April 29, 1851. Am'd. 1860, 299; 1862, 562.

Cal. Rep. Cit. 9, 423.

Prac. Act, sec. 55. En. April 29, 1851.

Cal. Rep. Cit. 19, 34; 19, 39; 33, 211.

Attorneys' power to bind client: Ante, sec. 283.

Verifying accusation for disbarring attorney: See sec. 291, ante.

§ 447. Copy of written instrument contained in complaint admitted, unless answer is verified. When an action is brought upon a written instrument, and the complaint contains a copy of such instrument, or a copy is annexed thereto, the genuineness and due execution of such instrument are deemed admitted, unless the answer denying the same be verified. En. March 11, 1872.

Cal. Rep. Cit. 71, 394; 73, 411; 74, 411; 80, 613; 82, 505; 82, 506; 127, 29; 128, 328; 130, 103; 135, 677; 143, 134; 146, 694.

Prac. Act, sec. 53. En. April 29, 1851.

Cal. Rep. Cit. 6, 7; 32, 88.

§ 448. When defense is founded on written instrument set out in answer, its execution admitted, unless denied by plaintiff, under oath. When the defense to an action is founded on a written instrument, and a copy thereof is contained in the answer, or is annexed thereto, the genuineness and due execution of such instrument are deemed admitted unless the plaintiff file with the clerk, within ten days after receiving a copy of the answer, an affidavit denying the same, and serve a copy thereof on the defendant. En. March 11, 1872. Am'd. 1873-4, 301.

Cal. Rep. Cit. 60, 630; 66, 88; 73, 275; 80, 613; 104, 581; 108, 361; 108, 362; 110, 200; 110, 203; 119, 431; 119, 432; 122, 570; 122, 675; 125, 199; 128, 424; 135, 677; 143, 134.

Prac. Act, sec. 54. En. April 29, 1851. Am'd. 1860, 299; 1862, 562; 1866, 702.

Cal. Rep. Cit. 49, 40.

§ 449. Exceptions to rules prescribed by two preceding sections. But the execution of the instrument mentioned in the two preceding sections is not deemed admitted by a failure to deny the same under oath, if the party desiring to controvert the same is, upon demand, refused an inspection of the original. Such demand must be in writing, served by copy, upon the adverse party or his attorney, and filed with the papers in the case. En. March 11, 1872. Am'd. 1880, 111.

Inspection of writings, order for: Post, sec. 1000,

CHAPTER VII.

GENERAL RULES OF PLEADING.

- § 452. Pleadings to be liberally construed.
- § 453. Sham and irrelevant answers, etc., may be stricken out.
- § 454. How to state an account in pleadings.
- § 455. Description of real property in a pleading.
- § 456. Judgments, how pleaded.
- § 457. Conditions precedent, how to be pleaded.
- § 458. Statute of limitations, how pleaded.
- § 459. Private statutes, how pleaded.
- § 460. Libel and slander, how stated in complaint.
- § 461. Answer in such cases.
- § 462. Allegations not denied, when to be deemed true. When to be deemed controverted.
- § 463. A material allegation defined.
- § 464. Supplemental complaint and answer.
- § 465. Pleadings subsequent to complaint must be filed and served.

§ 452. Pleadings to be liberally construed. In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties. En. March 11, 1872.

Cal. Rep. Cit. 56, 90; 88, 194; 103, 286; 105, 257; 130, 496; 135, 48; 136, 71.

Prac. Act, sec. 70. En. April 29, 1851.

Cal. Rep. Cit. 28, 680; 28, 683; 32, 192; 39, 175.

§ 453. Sham and irrelevant answers, etc., may be stricken out. Sham and irrelevant answers, and irrelevant and redundant matter inserted in a pleading, may be stricken out, upon such terms as the court may, in its discretion, impose. En. March 11, 1872.

Cal. Rep. Cit. 53, 259; 57, 287; 65, 342; 98, 417; 98, 418; 100, 433; 112, 173.

Prac. Act, sec. 57. En. April 29, 1851.

Cal. Rep. Cit. 8, 369; 30, 564.

§ 454. How to state an account in pleadings. It is not necessary for a party to set forth in a pleading the items of an account therein alleged, but he must deliver to the adverse party, within five days after a demand thereof in writing, a copy of the account, or be precluded from giving evidence thereof. The court or judge thereof may

order a further account when the one delivered is too general or is defective in any particular. En. March 11, 1872. Am'd. 1880, 2.

Cal. Rep. Cit. 70, 562; 74, 64; 74, 73; 74, 76; 74, 77; 77, 186; 77, 413; 82, 151; 84, 182; 84, 184; 90, 435; 96, 671; 97, 68; 103, 555; 104, 466; 110, 692; 114, 38; 123, 87; 135, 407; 141, 601.

Prac. Act, sec. 56. En. April 29, 1851.

Cal. Rep. Cit. 17, 281.

§ 455. **Description of real property in a pleading.** In an action for the recovery of real property, it must be described in the complaint with such certainty as to enable an officer upon execution to identify it. En. March 11, 1872.

Prac. Act, sec. 58. En. April 29, 1851.

Cal. Rep. Cit. 6, 156; 30, 565.

§ 456. **Judgments, how pleaded.** In pleading a judgment, or other determination of a court, officer, or board, it is not necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation be controverted, the party pleading must establish on the trial the facts conferring jurisdiction. En. March 11, 1872.

Cal. Rep. Cit. 47, 512; 52, 410; 57, 391; 59, 451; 65, 284; 65, 424; 71, 259; 77, 189; 90, 369; 92, 335; 93, 110; 97, 9; 99, 215; 118, 420; 118, 682; 121, 28; 124, 18; 125, 455; 127, 580; 128, 397; 138, 230; 139, 57; 139, 60.

Prac. Act, sec. 59. En. April 29, 1851.

Cal. Rep. Cit. 35, 448; 38, 601; 93, 110.

Judgment as an estoppel: See post, sec. 1908.

§ 457. **Conditions precedent, how to be pleaded.** In pleading the performance of conditions precedent in a contract, it is not necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part, and if such allegations be controverted, the party pleading must establish, on the trial, the facts showing such performance. En. March 11, 1872.

Cal. Rep. Cit. 66, 573; 75, 638; 76, 41; 78, 184; 78, 185; 87, 498; 89, 174; 123, 91; 133, 31; 139, 595; 141, 672.

Prac. Act, sec. 60. En. April 29, 1851.

Cal. Rep. Cit. 6, 263; 25, 303; 35, 448; 36, 177; 47, 431.

Conditions precedent: See Civ. Code, secs. 1436 et seq.

§ 458. Statute of limitations, how pleaded. In pleading the statute of limitations, it is not necessary to state the facts showing the defense, but it may be stated generally that the cause of action is barred by the provisions of section — (giving the number of the section and subdivision thereof, if it is so divided, relied upon) of the Code of Civil Procedure; and if such allegation be controverted, the party pleading must establish, on the trial, the facts showing that the cause of action is so barred. En. March 11, 1872.

Cal. Rep. Cit. 56, 381; 68, 351; 68, 352; 72, 76; 72, 600; 73, 421; 95, 194; 116, 59; 120, 162; 124, 449; 135, 610.

§ 459. Private statutes, how pleaded. In pleading a private statute, or a right derived therefrom, it is sufficient to refer to such statute by its title and the day of its passage. En. March 11, 1872.

Cal. Rep. Cit. 95, 315; 126, 229.

Prac. Act, sec. 61. En. April 29, 1851.

Cal. Rep. Cit. 1, 174; 1, 177.

§ 460. Libel and slander, how stated in complaint. In an action for libel or slander, it is not necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose; but it is sufficient to state, generally, that the same was published or spoken concerning the plaintiff; and if such allegation be controverted, the plaintiff must establish, on the trial, that it was so published or spoken. En. March 11, 1872.

Cal. Rep. Cit. 57, 578; 66, 678; 66, 679; 93, 64; 93, 67; 93, 73; 122, 61; 132, 226.

Prac. Act, sec. 62. En. April 29, 1851.

Cal. Rep. Cit. 1, 159; 1, 196.

Libel and slander: See Civ. Code, secs. 44 et seq.

§ 461. Answer in such cases. In the actions mentioned in the last section, the defendant may, in his answer, allege both the truth of the matter charged as defamatory, and any mitigating circumstances, to reduce the amount of damages; and whether he prove the justification or not, he

may give in evidence the mitigating circumstances. En. March 11, 1872.

Cal. Rep. Cit. 82, 528; 107, 269.

Prac. Act, sec. 63. En. April 29, 1851.

Cal. Rep. Cit. 1, 195; 9, 536; 47, 258.

Libel and slander: See Civ. Code, secs. 44 et seq.

§ 462. Allegations not denied, when to be deemed true. When to be deemed controverted. Every material allegation of the complaint, not controverted by the answer, must, for the purposes of the action, be taken as true; the statement of any new matter in the answer, in avoidance or constituting a defense or counterclaim, must, on the trial, be deemed controverted by the opposite party. En. March 11, 1872.

Cal. Rep. Cit. 56, 373; 57, 589; 65, 422; 82, 95; 82, 573; 84, 204; 88, 227; 89, 344; 92, 562; 94, 543; 97, 346; 104, 581; 107, 432; 117, 240; 119, 431; 119, 432; 119, 433; 119, 528; 119, 529; 119, 530; 120, 162; 122, 570; 122, 571; 122, 675; 124, 215; 125, 489; 127, 541; 128, 425; 128, 426; 131, 10; 132, 11; 132, 291; 140, 378; 141, 474; 144, 112; 145, 440; 145, 629; 146, 388; 146, 620; 146, 723.

Prac. Act, sec. 65. En. April 29, 1851. Am'd. 1854, 60; 1860, 300; 1861, 494; 1862, 563; 1866, 703.

Cal. Rep. Cit. 6, 200; 7, 262; 9, 62; 8, 149; 14, 93; 14, 509; 18, 314; 19, 34; 21, 350; 25, 197; 28, 244; 31, 195; 32, 456; 35, 29; 38, 585; 39, 177; 39, 259.

Cross-complaint must be replied to: See ante, sec. 442. Answer: See, generally, ante, sec. 437.

Material allegations: Post, sec. 463.

§ 463. A material allegation defined. A material allegation in a pleading is one essential to the claim or defense, and which could not be stricken from the pleading without leaving it insufficient. En. March 11, 1872.

Cal. Rep. Cit. 84, 418.

Prac. Act, sec. 66. En. April 29, 1851.

Cal. Rep. Cit. 9, 500; 21, 350; 32, 456; 122, 164.

Immaterial allegations need not be answered: See sec. 462.

§ 464. Supplemental complaint and answer. The plaintiff and defendant, respectively, may be allowed, on motion,

to make a supplemental complaint or answer, alleging facts material to the case occurring after the former complaint or answer. En. March 11, 1872.

Cal. Rep. Cit. 54, 504; 60, 249; 98, 337; 102, 623; 109, 121; 127, 633.

Prac. Act, sec. 67. En. April 29, 1851. Am'd. 1854, 60; 1860, 300; 1862, 563; 1866, 703.

Cal. Rep. Cit. 1, 175; 12, 439; 25, 587; 28, 672; 33, 501; 36, 110; 38, 541.

Amendments to pleadings: Post, secs. 472, 473.

§ 465. Pleadings subsequent to complaint must be filed and served. All pleadings subsequent to the complaint must be filed with the clerk, and copies thereof served upon the adverse party or his attorney. En. March 11, 1872. Am'd. 1873-4, 301.

Cal. Rep. Cit. 60, 295; 67, 432; 114, 475; 136, 363; 139, 717.

Service of papers: Secs. 1011 et seq.

Amendment of pleadings, service of: Post, secs. 472; ante, 432.

Extending time to serve papers: See post, sec. 1054.

CHAPTER VIII.

VARIANCE—MISTAKES IN PLEADINGS AND AMENDMENTS.

§ 469. Material variances, how provided for.

§ 470. Immaterial variance, how provided for.

§ 471. What not to be deemed a variance.

§ 472. Amendments of course, and effect of demurrer.

§ 473. Amendments by the court, Enlarging time to plead and relieving from judgment, etc.

§ 474. Suing a party by a fictitious name, when allowed.

§ 475. No error or defect to be regarded unless it affects substantial rights.

§ 476. Time to amend or answer, running of.

§ 469. Material variances, how provided for. No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it appears that a party has been so misled, the court may order the pleading to be

amended, upon such terms as may be just. En. March 11, 1872. Am'd. 1873-4, 302.

Cal. Rep. Cit. 54, 441; 59, 576; 65, 525; 72, 567; 74, 297; 75, 362; 90, 261; 94, 94; 95, 478; 98, 113; 102, 587; 114, 348; 116, 332; 116, 380; 116, 559; 119, 380; 120, 69; 121, 172; 132, 401; 134, 418; 135, 48; 135, 87; 135, 569; 136, 72; 140, 320; 142, 144; 143, 134; 145, 494.

Prac. Act, sec. 579. En. April 29, 1851.

Cal. Rep. Cit. 31, 386.

Immaterial variance: Post, sec. 470.

Variance and failure of proof: Post, sec. 471.

Immaterial errors, generally: See post, sec. 475.

§ 470. Immaterial variance, how provided for. Where the variance is not material, as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs. En. March 11, 1872.

Cal. Rep. Cit. 57, 336; 59, 576; 65, 620; 75, 362; 85, 508; 106, 152; 116, 559; 121, 172; 121, 193; 130, 274; 132, 423; 132, 427; 142, 115; 142, 144; 143, 134; 147, 719.

Variance, material: Ante, sec. 469; fatal: Post, sec. 471.

§ 471. What not to be deemed a variance. Where, however, the allegation of the claim or defense to which the proof is directed, is unproved, not in some particular or particulars only, but in its general scope and meaning, it is not to be deemed a case of variance, within the last two sections, but a failure of proof. En. March 11, 1872.

Cal. Rep. Cit. 59, 576; 69, 87; 121, 172; 132, 423; 132, 427; 143, 134.

Proof generally: Post, secs. 1824, 1869.

Proof, failure of—dismissal for: Post, sec. 581, subd. 5.

§ 472. Amendments of course, and effect of demurrer. Any pleading may be amended once by the party of course, and without costs, at any time before answer or demurrer filed, or after demurrer and before the trial of the issue of law thereon, by filing the same as amended, and serving a copy on the adverse party, who may have ten days thereafter in which to answer or demur to the amended pleading. A demurrer is not waived by filing an answer at the same time; and when the demurrer to a complaint is overruled,

and there is no answer filed, the court may, upon such terms as may be just, allow an answer to be filed. If a demurrer to the answer be overruled, the facts alleged in the answer must be considered as denied to the extent mentioned in section 462. En. March 11, 1872. Am'd. 1873-4, 302.

Cal. Rep. Cit. 53, 294; 55, 516; 58, 94; 58, 97; 68, 616; 72, 521; 84, 218; 86, 399; 86, 605; 106, 60; 109, 72; 109, 121; 119, 72; 119, 108; 119, 304; 119, 413; 132, 423; 132, 424; 132, 427; 135, 480; 143, 134; 145, 212.

Complaint, amended—filing: Sec. 432.

Answer no waiver of demurrer: Ante, sec. 431.

§ 473. Amendments by the court. Enlarging time to plead and relieving from judgments, etc. The court may, in furtherance of justice, and on such terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect; and may, upon like terms, enlarge the time for answer or demurrer. The court may likewise, in its discretion, after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading or proceeding in other particulars; and may upon like terms allow an answer to be made after the time limited by this code; and may, also, upon such terms as may be just, relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect; provided, that application therefor be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken. When from any cause the summons in an action has not been personally served on the defendant, the court may allow, on such terms as may be just, such defendant or his legal representative, at any time within one year after the rendition of any judgment in such action, to answer to the merits of the original action. When, in an action to recover the possession of personal property, the person making an affidavit did not truly state the value of the property, and the officer taking the property, or the sureties on any bond or undertaking, is sued for taking the same, the officer or sureties may in their answer set up the true value of the property, and that the person in whose behalf said affidavit was made was entitled to the possession of the same when said affidavit was made, or that the

value in the affidavit stated was inserted by mistake, the court shall disregard the value as stated in the affidavit, and give judgment according to the right of possession of said property at the time the affidavit was made. En. March 11, 1872. Am'd. 1873-4, 302; 1880, 2.

Cal. Rep. Cit. 48, 562; 51, 119; 51, 155; 56, 250; 57, 336; 60, 229; 60, 250; 60, 253; 60, 366; 61, 296; 61, 298; 61, 300; 61, 301; 61, 360; 62, 282; 63, 457; 63, 477; 63, 478; 64, 14; 64, 430; 65, 370; 65, 371; 65, 397; 65, 495; 66, 337; 67, 54; 67, 501; 68, 215; 68, 277; 68, 371; 68, 372; 68, 401; 68, 423; 68, 606; 70, 235; 72, 218; 72, 222; 72, 223; 72, 377; 73, 205; 73, 553; 74, 343; 74, 344; 74, 403; 74, 404; 74, 405; 77, 307; 80, 200; 80, 333; 82, 509; 82, 510; 83, 228; 83, 459; 84, 111; 84, 112; 84, 514; 84, 608; 85, 94; 85, 117; 86, 60; 86, 496; 86, 563; 86, 596; 87, 154; 89, 337; 90, 19; 90, 564; 91, 322; 91, 587; 92, 201; 92, 350; 92, 355; 93, 389; 93, 511; 93, 512; 94, 43; 94, 44; 94, 545; 95, 523; 96, 658; 96, 659; 97, 92; 97, 390; 97, 391; 97, 392; 97, 393; 97, 516; 97, 629; 97, 631; 97, 632; 98, 250; 99, 625; 99, 626; 99, 627; 100, 92; 101, 34; 101, 575; 102, 603; 102, 616; 102, 617; 103, 453; 103, 536; 104, 38; 108, 214; 108, 234; 109, 72; 109, 121; 109, 686; 109, 687; 109, 690; 110, 504; 112, 117; 113, 342; 115, 101; 116, 51; 116, 93; 116, 135; 116, 283; 116, 381; 118, 97; 118, 360; 118, 592; 119, 107; 119, 109; 119, 110; 119, 366; 119, 589; 120, 37; 121, 416; 121, 418; 121, 419; 122, 109; 122, 208; 122, 209; 123, 171; 123, 253; 123, 254; 123, 540; 124, 74; 124, 143; 124, 144; 125, 203; 126, 55; 126, 372; 127, 170; 128, 245; 128, 393; 128, 561; 129, 15; 129, 282; 129, 311; 129, 312; 130, 390; 130, 514; 130, 667; 131, 617; 132, 8; 132, 423; 132, 424; 132, 427; 134, 127; 134, 128; 134, 383; 134, 384; 136, 390; 137, 139; 138, 26; 138, 200; 138, 300; 138, 642; 139, 591; 139, 592; 139, 650; 139, 651; 140, 5; 140, 287; 140, 485; 140, 674; 142, 426; 143, 17; 143, 134; 143, 632; 143, 633; 143, 675; 144, 424; 145, 44; 145, 48; 145, 397; 145, 562; 145, 597; 146, 214; 146, 247; 146, 260; 146, 498; 147, 377; 147, 541.

Prac. Act, sec. 68. En. April 29, 1851. Am'd. 1853, 276; 1860, 300; 1865-6, 843.

Cal. Rep. Cit. 1, 175; 1, 192; 3, 118; 3, 134; 4, 281; 6, 174; 7, 32; 7, 280; 7, 281; 9, 111; 18, 456; 19, 708; 19, 709; 21, 273; 27, 333; 28, 338; 28, 339; 28, 652; 28, 672; 29, 74; 29, 423; 32, 121; 34, 26;

34, 80; 34, 172; 34, 241; 34, 239; 36, 289; 39, 108;
39, 313; 40, 426; 41, 443; 43, 258; 43, 260; 47,
527; 49, 307; 49, 308; 57, 336; 58, 97; 72, 222;
74, 403; 85, 117; 97, 391; 99, 626; 139, 650.

§ 474. Suing a party by a fictitious name, when allowed. When the plaintiff is ignorant of the name of a defendant, he must state that fact in the complaint, and such defendant may be designated in any pleading or proceeding by any name, and when his true name is discovered, the pleading or proceeding must be amended accordingly. En March 11, 1872.

Cal. Rep. Cit. 63, 119; 70, 25; 113, 500; 125, 104; 143, 134.

Prac. Act, sec. 69. En. April 29, 1851.

Cal. Rep. Cit. 40, 490; 40, 491; 42, 578.

§ 475. No error or defect to be regarded unless it affects substantial rights. The court must, in every stage of an action, disregard any error, improper ruling, instruction, or defect, in the pleadings or proceedings which, in the opinion of said court, does not affect the substantial rights of the parties. No judgment, decision, or decree shall be reversed or affected by reason of any error, ruling, instruction, or defect, unless it shall appear from the record that such error, ruling, instruction, or defect was prejudicial, and also that by reason of such error, ruling, instruction, or defect, the said party complaining or appealing sustained and suffered substantial injury, and that a different result would have been probable if such error, ruling, instruction, or defect had not occurred or existed. There shall be no presumption that error is prejudicial, or that injury was done if error is shown. En. March 11, 1872. Am'd. 1897, 44.

Cal. Rep. Cit. 48, 354; 52, 184; 57, 619; 61, 305; 63, 34;
64, 24; 65, 390; 66, 58; 67, 4; 68, 274; 68, 616;
71, 185; 71, 191; 72, 20; 72, 556; 73, 189; 73, 553;
76, 280; 76, 632; 77, 94; 78, 492; 79, 208; 79, 586;
82, 337; 82, 424; 84, 201; 88, 452; 89, 506; 90, 94;
95, 295; 96, 77; 96, 402; 97, 597; 101, 312; 106, 152;
111, 686; 112, 227; 113, 536; 115, 277; 115, 372; 116, 600;
117, 25; 121, 172; 123, 346; 126, 325; 128, 245; 128, 268;
128, 526; 129, 202; 129, 272; 130, 496; 132, 196; 133, 449;
135, 35; 135, 48; 135, 569; 136, 71; 138, 452; 140, 591;
145, 285; 145, 495; 147, 508.

Prac. Act, sec. 71. En. April 29, 1851.

Cal. Rep. Cit. 28, 265; 32, 14; 37, 336; 39, 175; 41, 317.

Similar provision in Pen. Code, secs. 1258, 1404.

§ 476. Time to amend or answer, running of. When a demurrer to any pleading is sustained or overruled, and time to amend or answer is given, the time so given runs from the service of notice of the decision or order. En. Stats. 1873-4, 304.

Cal. Rep. Cit. 52, 338; 58, 96; 77, 151; 95, 367; 99, 176; 116, 51; 129, 250.

Time to answer: Ante, secs. 432, 472, 473.

Notice, service of: Secs. 1010 et seq.

TITLE VII.

OF THE PROVISIONAL REMEDIES IN CIVIL ACTIONS.

Chapter I. Arrest and Bail, §§ 478-504.

II. Claim and Delivery of Personal Property.
§§ 509-521.

III. Injunction, §§ 525-533.

IV. Attachment, §§ 537-559.

V. Receivers, §§ 564-569.

VI. Deposits in Court, §§ 572-574.

CHAPTER I.

ARREST AND BAIL.

- § 478. No person to be arrested except as prescribed by this code.
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- § 500. Money deposited, how applied or disposed of.
- § 501. Sheriff, when liable as bail, and his discharge from liability.
- § 502. Proceedings on judgment against sheriff.
- § 503. Motion to vacate order of arrest or reduce bail. Affidavits on motion.
- § 504. When the order vacated or bail reduced.

§ 478. No person to be arrested except as prescribed by this code. No person can be arrested in a civil action, except as prescribed in this code. En. March 11, 1872.

Cal. Rep. Cit. 49, 466; 101, 334; 120, 317.

Prac. Act, sec. 72. En. April 29, 1851.

Cal. Rep. Cit. 5, 283; 36, 167.

Exemption from arrest.—Constitutional provisions.—Imprisonment for debt, except for fraud, and in civil actions for torts, except in cases of willful injury to person or property, abolished: Art. 1, sec. 15. Members of legislature exempted from arrest: Art. 4, sec. 11. Electors are privileged on election day while in attendance at an election: Art. 2, sec. 2. No person to be imprisoned for a militia fine in time of peace: Art. 1, sec. 15.

Code provisions.—Electors are privileged from arrest on election days, being the same in effect as the constitutional provision above: Pol. Code, sec. 1069. Persons belonging to the military forces, while in attendance for military duty, are also exempt from arrest on civil process: Pol. Code, sec. 2021. Females privileged from arrest in civil actions, at least in justices' courts: Post, sec. 861. Witnesses are likewise privileged: Post, sec. 2067. Arrest in justices' court: Post, secs. 861 et seq.

§ 479. Cases in which defendant may be arrested. The defendant may be arrested, as hereinafter prescribed, in the following cases:

1. In an action for the recovery of money or damages on a cause of action arising upon contract, express or implied, when the defendant is about to depart from the state with intent to defraud his creditors.

2. In an action for a fine or penalty, or for money or property embezzled, or fraudulently misapplied, or converted to his own use, by a public officer, or an officer of a corporation, or an attorney, factor, broker, agent, or clerk, in the course of his employment as such, or by any other person in a fiduciary capacity; or for misconduct or neglect in office, or in a professional employment, or for a willful violation of duty.

3. In an action to recover the possession of personal property unjustly detained, when the property, or any part thereof, has been concealed, removed, or disposed of, to prevent its being found or taken by the sheriff.

4. When the defendant has been guilty of a fraud in contracting the debt or incurring the obligation for which the action is brought, or in concealing or disposing of the property for the taking, detention, or conversion of which the action is brought.

5. When the defendant has removed or disposed of his property, or is about to do so, with intent to defraud his creditors. En. March 11, 1872. Am'd. 1873-4, 304.

Cal. Rep. Cit. 120, 317; 130, 68; 138, 250. Subd. 1—130, 67. Subd. 2—130, 650. Subd. 3—130, 69. Subd. 5—130, 67.

Prac. Act, sec. 73. En. April 29, 1851.

Cal. Rep. Cit. 6, 240; 42, 20.

§ 480. Order for arrest, by whom made. An order for the arrest of the defendant must be obtained from a judge of the court in which the action is brought. En. March 11, 1872. Am'd. 1880, 3.

Cal. Rep. Cit. 130, 69.

Prac. Act, sec. 74. En. April 29, 1851.

Cal. Rep. Cit. 1, 345; 1, 440.

§ 481. Affidavit to obtain order, what to contain. The order may be made whenever it appears to the judge, by the affidavit of the plaintiff, or some other person, that a sufficient cause of action exists, and that the case is one of those mentioned in section four hundred and seventy-nine. The affidavit must be either positive or upon information and belief, and when upon information and belief, it must state the facts upon which the information and belief are founded. If an order of arrest be made, the affidavit must be filed with the clerk of the court. En. March 11, 1872. Am'd. 1873-4, 305.

Cal. Rep. Cit. 59, 190; 120, 317; 120, 321; 130, 68.

Prac. Act, sec. 75. En. April 29, 1851.

§ 482. Security by plaintiff before order of arrest. Before making the order, the judge must require a written undertaking on the part of the plaintiff, with sureties in an amount to be fixed by the judge, which must be at least five hundred dollars, to the effect that the plaintiff will pay all costs which may be adjudged to the defendant, and all damages which he may sustain by reason of the arrest, if the same be wrongful, or without sufficient cause, not exceeding the sum specified in the undertaking. The undertaking must be filed with the clerk of the court. En. March 11, 1872. Am'd. 1873-4, 305.

Prac. Act, sec. 76. En. April 29, 1851.

Undertakings, generally: Ante, sec. 105. Court commissioner's power to take: Ante, sec. 259.

§ 483. **Order, when made and its form.** The order may be made at the time of the issuing of the summons, or any time afterwards before judgment. It must require the sheriff of the county where the defendant may be found, forthwith to arrest him and hold him to bail in a specified sum, and to return the order at a time therein mentioned, to the clerk of the court in which the action is pending. En. March 11, 1872.

Cal. Rep. Cit. 59, 190; 130, 69.

Prac. Act, sec. 77. En. April 29, 1851.

§ 484. **Affidavit and order to be delivered to the sheriff, and copy to defendant.** The order of arrest, with a copy of the affidavit upon which it is made, must be delivered to the sheriff, who, upon arresting the defendant, must deliver to him a copy of the affidavit, and also, if desired, a copy of the order of arrest. En. March 11, 1872.

Prac. Act, sec. 78. En. April 29, 1851.

Sheriff's duties.—To excuse omission by sheriff, direction by party or attorney must be in writing: Pol. Code, sec. 4185.

§ 485. **Arrest, how made.** The sheriff must execute the order by arresting the defendant and keeping him in custody until discharged by law. En. March 11, 1872.

Prac. Act, sec. 79. En. April 29, 1851.

Production of process upon request: Pol. Code, sec. 4188.

§ 486. **Defendant to be discharged on bail or deposit.** The defendant, at any time before execution, must be discharged from the arrest, either upon giving bail or upon depositing the amount mentioned in the order of arrest. En. March 11, 1872.

Prac. Act, sec. 80. En. April 29, 1851.

§ 487. **Bail, how given.** The defendant may give bail by causing a written undertaking to be executed by two or more sufficient sureties, to the effect that they are bound in the amount mentioned in the order of arrest, that the

defendant will at all times render himself amenable to the process of the court during the pendency of the action, and to such as may be issued to enforce the judgment therein, or that they will pay to the plaintiff the amount of any judgment which may be recovered in the action. En. March 11, 1872.

Cal. Rep. Cit. 130, 650.

Prac. Act, sec. 81. En. April 29, 1851.

Bail—Qualifications of: Post, secs. 494, 1057.

§ 488. **Surrender of defendant.** At any time before judgment, or within ten days thereafter, the bail may surrender the defendant in their exoneration; or he may surrender himself to the sheriff of the county where he was arrested. En. March 11, 1872.

Prac. Act, sec. 82. En. April 29, 1851.

§ 489. **Same.** For the purpose of surrendering the defendant, the bail, at any time or place before they are finally charged, may themselves arrest, or, by a written authority indorsed on a certified copy of the undertaking, may empower the sheriff to do so. Upon the arrest of defendant by the sheriff, or upon his delivery to the sheriff by the bail, or upon his own surrender, the bail are exonerated, if such arrest, delivery, or surrender take place before the expiration of ten days after judgment; but if such arrest, delivery, or surrender be not made within ten days after judgment, the bail are finally charged on their undertaking, and bound to pay the amount of the judgment within ten days thereafter. En. March 11, 1872.

Prac. Act, sec. 83. En. April 29, 1851.

§ 490. **Bail, how proceeded against.** If the bail neglect or refuse to pay the judgment within ten days after they are finally charged, an action may be commenced against such bail for the amount of the original judgment. En. March 11, 1872.

Prac. Act, sec. 84. En. April 29, 1851. Am'd. 1854, 60.

§ 491. **Bail, how exonerated.** The bail are exonerated by the death of the defendant, or his imprisonment in a state prison, or by his legal discharge from the obligation to render himself amenable to the process. En. March 11, 1872.

Prac. Act, sec. 85. En. April 29, 1851.

Code Civil Proc.—12.

§ 492. Delivery of undertaking to plaintiff, and its acceptance or rejection by him. Within the time limited for that purpose, the sheriff must file the order of arrest in the office of the clerk of the court in which the action is pending, with his return indorsed thereon, together with a copy of the undertaking of the bail. The original undertaking he must retain in his possession until filed, as herein provided. The plaintiff, within ten days thereafter, may serve upon the sheriff a notice that he does not accept the bail, or he is deemed to have accepted them, and the sheriff is exonerated from liability. If no notice be served within ten days, the original undertaking must be filed with the clerk of the court. En. March 11, 1872.

Prac. Act, sec. 86. En. April 29, 1851.

§ 493. Notice of justification. New undertaking, if other bail. Within five days after the receipt of notice, the sheriff or defendant may give to the plaintiff, or his attorney, notice of the justification of the same, or other bail (specifying the places of residence and occupations of the latter), before a judge of the court, or county clerk, at a specified time and place; the time to be not less than five nor more than ten days thereafter, except by consent of parties. In case other bail be given, there must be a new undertaking. En. March 11, 1872. Am'd. 1880, 3.

Prac. Act, sec. 87. En. April 29, 1851.

Justification of bail: See sec. 495, *infra*.

§ 494. Qualification of bail. The qualifications of bail are as follows:

1. Each of them must be a resident and householder, or freeholder, within the state.

2. Each must be worth the amount specified in the order of the arrest, or the amount to which the order is reduced, as provided in this chapter, over and above all his debts and liabilities, exclusive of property exempt from execution; but the judge or county clerk, on justification, may allow more than two sureties to justify severally, in amounts less than that expressed in the order, if the whole justification be equivalent to that of two sufficient bail. En. March 11, 1872. Am'd. 1873-4, 306.

Prac. Act, sec. 88. En. April 29, 1851.

Qualifications—of bail: Post, sec. 1057.

§ 495. **Justification of bail.** For the purpose of justification, each of the bail must attend before the judge or county clerk, at the time and place mentioned in the notice, and may be examined on oath, on the part of the plaintiff, touching his sufficiency, in such manner as the judge or clerk, in his discretion, may think proper. The examination must be reduced to writing, and subscribed by the bail, if required by the plaintiff. En. March 11, 1872.

Prac. Act, sec. 89. En. April 29, 1851.

Justification: Ante, sec. 259, subd. 3.

§ 496. **Allowance of bail.** If the judge or clerk find the bail sufficient, he must annex the examination to the undertaking, indorse his allowance thereon, and cause them to be filed, and the sheriff is thereupon exonerated from liability. En. March 11, 1872.

Cal. Rep. Cit. 62, 544.

Prac. Act, sec. 90. En. April 29, 1851.

Court commissioners—powers as to bail: Ante, sec. 259, subd. 3.

§ 497. **Deposit of money with sheriff.** The defendant may, at the time of his arrest, instead of giving bail, deposit with the sheriff the amount mentioned in the order. In case the amount of the bail be reduced, as provided in this chapter, the defendant may deposit such amount instead of giving bail. In either case, the sheriff must give the defendant a certificate of the deposit made, and the defendant must be discharged from custody. En. March 11, 1872.

Cal. Rep. Cit. 51, 217.

Prac. Act, sec. 91. En. April 29, 1851.

§ 498. **Payment of money into court by sheriff.** The sheriff must, immediately after the deposit, pay the same into court, and take from the clerk receiving the same two certificates of such payment, the one of which he shall deliver to the plaintiff's attorney, and the other to the defendant. For any default in making such payment, the same proceedings may be had on the official bond of the sheriff, to collect the sum deposited, as in other cases of delinquency. En. March 11, 1872.

Prac. Act, sec. 92. En. April 29, 1851.

Sheriff—Penalty for nonpayment: Pol. Code, sec. 4181.

§ 499. Substituting bail for deposit. If money is deposited, as provided in the two last sections, bail may be given, and may justify upon notice, at any time before judgment; and on the filing of the undertaking and justification with the clerk, the money deposited must be refunded to the defendant. En. March 11, 1872.

Prac. Act, sec. 93. En. April 29, 1851.

§ 500. Money deposited, how applied or disposed of. Where money has been deposited, if it remain on deposit at the time of the recovery of a judgment in favor of the plaintiff, the clerk must, under the direction of the court, apply the same in satisfaction thereof, and after satisfying the judgment, refund the surplus, if any, to the defendant. If the judgment is in favor of the defendant, the clerk must, under like direction of the court, refund to him the whole sum deposited and remaining unapplied. En. March 11, 1872.

Prac. Act, sec. 94. En. April 29, 1851.

§ 501. Sheriff, when liable as bail, and his discharge from liability. If, after being arrested, the defendant escape or is rescued, the sheriff is liable as bail; but he may discharge himself from such liability by the giving bail at any time before judgment. En. March 11, 1872.

Prac. Act, sec. 95. En. April 29, 1851.

Cal. Rep. Cit. 27, 494.

Rescue, liability of sheriff permitting: See Pol. Code, secs. 4183, 4184.

Escape, liability of sheriff permitting: See Pol. Code, secs. 4182, 4184.

§ 502. Proceedings on judgment against sheriff. If a judgment is recovered against the sheriff, upon his liability as bail, and an execution thereon is returned unsatisfied in whole or in part, the same proceedings may be had on his official bond for the recovery of the whole or any deficiency, as in other cases of delinquency. En. March 11, 1872.

Prac. Act, sec. 96. En. April 29, 1851.

§ 503. Motion to vacate order of arrest or reduce bail. Affidavits on motion. A defendant arrested may, at any time before the trial of the action, or if there be no trial, before the entry of judgment, apply to the judge who made the order, or the court in which the action is pending, upon reasonable notice, to vacate the order of arrest or to reduce the amount of bail. If the application be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits, or other proofs, in addition to those on which the order of arrest was made. En. March 11, 1872. Am'd. 1873-4, 306.

Prac. Act, sec. 97. En. April 29, 1851.

§ 504. When the order vacated or bail reduced. If, upon such application, it appears that there was not sufficient cause for the arrest, the order must be vacated; or if it appears that the bail was fixed too high, the amount must be reduced. En. March 11, 1872.

Prac. Act, sec. 98. En. April 29, 1851.

CHAPTER II.

CLAIM AND DELIVERY OF PERSONAL PROPERTY.

- § 509. Delivery of personal property, when it may be claimed.
- § 510. Affidavit and its requisites.
- § 511. Requisition to sheriff to take and deliver the property.
- § 512. Security on the part of the plaintiff and proceedings in serving the order.
- § 513. Exception to sureties and proceedings thereon, or on failure to except.
- § 514. Defendant, when entitled to redelivery.
- § 515. Justification of defendant's sureties.
- § 516. Qualification of sureties.
- § 517. Property, how taken, when concealed in building or inclosure.
- § 518. Property, how kept.
- § 519. Claim of property by third person.
- § 520. Notice and affidavit, when and where to be filed.
- § 521. Actions on undertaking. (Repealed.)

§ 509. Delivery of personal property, when it may be claimed. The plaintiff in an action to recover the pos-

session of personal property may, at the time of issuing the summons, or at any time before answer claim the delivery of such property to him, as provided in this chapter. En. March 11, 1872.

Cal. Rep. Cit. 61, 97; 66, 487; 88, 203; 94, 106; 130, 263; 130, 264.

Prac. Act, sec. 99. En. April 29, 1851.

Judgment: Post, secs. 627, 667.

Verdict in actions for recovery of specific personalty: Post, sec. 627.

Sections made applicable to justice's court: Post, sec. 870.

§ 510. Affidavit and its requisites. Where a delivery is claimed, an affidavit must be made by the plaintiff, or by some one in his behalf, showing:

1. That the plaintiff is the owner of the property claimed (particularly describing it), or is entitled to the possession thereof;

2. That the property is wrongfully detained by the defendant;

3. The alleged cause of the detention thereof, according to his best knowledge, information and belief;

4. That it has not been taken for a tax, assessment, or fine, pursuant to a statute; or seized under an execution or an attachment against the property of the plaintiff; or if so seized, that it is by statute exempt from such seizure;

5. The actual value of the property. En. March 11, 1872.

Cal. Rep. Cit. 53, 743; 61, 97; 72, 331; 76, 289.

Prac. Act, sec. 100. En. April 29, 1851.

Subdivision 5. Value—incorrectly stated in affidavit: Ante, sec. 473.

§ 511. Requisition to sheriff to take and deliver the property. The plaintiff or his attorney may, thereupon, by an indorsement in writing upon the affidavit, require the sheriff of the county where the property claimed may be, to take the same from the defendant. En. March 11, 1872.

Cal. Rep. Cit. 53, 743; 76, 289; 145, 543.

Prac. Act, sec. 101. En. April 29, 1851. Am'd. 1854, 60.

Cal. Rep. Cit. 7, 571.

§ 512. Security on the part of the plaintiff and proceedings in serving the order. Upon a receipt of the affidavit

and notice with a written undertaking, executed by two or more sufficient sureties, approved by the sheriff, to the effect that they are bound to the defendant in double the value of the property, as stated in the affidavit for the prosecution of the action, for the return of the property to the defendants, if return thereof be adjudged, and for the payment to him of such sum as may, from any cause, be recovered against the plaintiff, the sheriff must forthwith take the property described in the affidavit, if it be in the possession of the defendant or his agent, and retain it in his custody. He must, without delay, serve on the defendant a copy of the affidavit, notice, and undertaking, by delivering the same to him personally, if he can be found, or to his agent from whose possession the property is taken; or if neither can be found, by leaving them at the usual place of abode of either, with some person of suitable age and discretion, or if neither have any known place of abode, by putting them in the nearest post-office, directed to the defendant. En. March 11, 1872.

Cal. Rep. Cit. 53, 743; 76, 289; 86, 648; 103, 310.

Prac. Act, sec. 102. En. April 29, 1851. Am'd. 1854, 61.

Cal. Rep. Cit. 7, 571; 21, 279.

Sheriff's duties: Pol. Code, secs. 4185, 4188, and generally, secs. 4175-4193.

Qualifications of sureties: Ante, sec. 494; post, sec. 1057.

Return of property to defendant—verdict for: Sec. 627; judgment for: Post, secs. 627, 667.

Dismissal of action—Clerk is to hand undertaking to defendant: Post, sec. 581, subd. 1.

Officer executing process must produce same on request: Pol. Code, sec. 4188.

Value stated in affidavit is not conclusive evidence against sheriff or sureties: Ante, sec. 473.

§ 513. Exception to sureties and proceedings thereon, or on failure to except. The defendant may, within two days after the service of a copy of the affidavit and undertaking, give notice to the sheriff that he excepts to the sufficiency of the sureties. If he fails to do so, he is deemed to have waived all objections to them. When the defendant excepts, the sureties must justify on notice in like manner as upon bail on arrest; and the sheriff is responsible

for the sufficiency of the sureties until the objection to them is either waived or until they justify. If the defendant except to the sureties, he cannot reclaim the property as provided in the next section. En. March 11, 1872.

Cal. Rep. Cit. 72, 331.

Prac. Act, sec. 103. En. April 29, 1851.

Justification of sureties: See ante, secs. 494, 495; post, sec. 1057.

§ 514. Defendant, when entitled to redelivery. At any time before the delivery of the property to the plaintiff, the defendant may, if he do not except to the sureties of the plaintiff, require the return thereof, upon giving to the sheriff a written undertaking, executed by two or more sufficient sureties, to the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may, for any cause, be recovered against the defendant. If a return of the property be not so required within five days after the taking and service of notice to the defendant, it must be delivered to the plaintiff, except as provided in section 519. En. March 11, 1872.

Cal. Rep. Cit. 53, 743; 65, 339; 72, 331; 84, 55; 84, 56; 88, 205; 91, 291.

Prac. Act, sec. 104. En. April 29, 1851.

Cal. Rep. Cit. 7, 570; 24, 149.

As to undertakings generally: See sec. 941.

Qualifications of sureties: Sec. 1057.

§ 515. Justification of defendant's sureties. The defendant's sureties, upon notice to the plaintiff of not less than two or more than five days, must justify before a judge or county clerk, in the same manner as upon bail on arrest; and upon such justification the sheriff must deliver the property to the defendant. The sheriff is responsible for the defendant's sureties until they justify, or until the justification is completed or waived, and may retain the property until that time. If they, or others in their place, fail to justify at the time and place appointed, he

must deliver the property to the plaintiff. En. March 11, 1872.

Cal. Rep. Cit. 84, 56; 87, 348.

Prac. Act, sec. 105. En. April 29, 1851.

§ 516. **Qualification of sureties.** The qualification of sureties must be such as are prescribed by this code, in respect to bail upon an order of arrest. En. March 11, 1872.

Cal. Rep. Cit. 64, 615.

Prac. Act, sec. 106. En. April 29, 1851.

Sureties—Qualifications of: Sec. 1057, post, and ante, secs. 494, 495.

§ 517. **Property, how taken, when concealed in building or inclosure.** If the property, or any part thereof be concealed in a building or inclosure, the sheriff must publicly demand its delivery. If it be not delivered, he must cause the building or inclosure to be broken open, and take the property into his possession; and, if necessary, he may call to his aid the power of his county. En. March 11, 1872.

Cal. Rep. Cit. 64, 615.

Prac. Act, sec. 107. En. April 29, 1851.

Duties of sheriff: See Pol. Code, secs. 4175 et seq.

§ 518. **Property, how kept.** When the sheriff has taken property, as in this chapter provided, he must keep it in a secure place, and deliver it to the party entitled thereto, upon receiving his fees for taking and his necessary expenses for keeping the same. En. March 11, 1872.

Prac. Act, sec. 108. En. April 29, 1851.

§ 519. **Claim of property by third person.** If the property taken be claimed by any other person than the defendant or his agent, and such person make affidavit of his title thereto, or right to the possession thereof, stating the grounds of such title or right, and serve the same upon the sheriff, the sheriff is not bound to keep the property or deliver it to the plaintiff, unless the plaintiff, on demand of him or his agent, indemnify the sheriff against such claim, by an undertaking, by two sufficient sureties; and no claim to such property by any other person than the

defendant or his agent is valid against the sheriff unless so made. En. March 11, 1872.

Cal. Rep. Cit. 72, 331.

Prac. Act, sec. 109. En. April 29, 1851.

§ 520. Notice and affidavit, when and where to be filed. The sheriff must file the notice, undertaking, and affidavit, with his proceedings thereon, with the clerk of the court in which the action is pending, within twenty days after taking the property mentioned therein. En. March 11, 1872.

Cal. Rep. Cit. 101, 315; 130, 263.

Prac. Act, sec. 110. En. April 29, 1851. Am'd. 1854, 61.

§ 521. Actions on undertaking. (Repealed.) En. March 11, 1872. Rep. 1873-4, 306.

CHAPTER III.

INJUNCTION.

§ 525. Injunction, what it is and who may grant it.

§ 526. When it may be granted.

§ 527. At what time it may be granted, and what is required to obtain it.

§ 528. Injunction after answer.

§ 529. Security upon injunction.

§ 530. Order to show cause why injunction should not be granted.

§ 531. Injunction to suspend business of a corporation, how and by whom granted.

§ 532. Motion to vacate or modify injunction.

§ 533. When to be vacated or modified.

§ 525. Injunction, what it is and who may grant it. An injunction is a writ or order requiring a person to refrain from a particular act. It may be granted by the court in which the action is brought, or by a judge thereof, and when made by a judge, it may be enforced as an order of the court. En. March 11, 1872; 1880, 3.

Cal. Rep. Cit. 81, 150; 136, 121; 146, 32.

Prac. Act, sec. 111. En. April 29, 1851.

Cal. Rep. Cit. 33, 389.

Injunction—Disobedience to is contempt: Post, secs. 1209, 1210; limitations, how affected by: Ante, sec. 356;

proceedings to obtain: Post, secs. 527 to 531; vacating or modifying: Ante, secs. 532, 533.

A seal is necessary to a writ: Sec. 152, subd. 1.

Courts and judges—Power to grant injunction, on any day: Ante, secs. 76, 134; at chambers: Ante, sec. 166; court commissioners not empowered to issue: Ante, sec. 258, subd 1.

§ 526. When it may be granted. An injunction may be granted in the following cases:

1. When it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually;

2. When it appears by the complaint or affidavit that the commission or continuance of some act during the litigation would produce waste, great or irreparable injury to the plaintiff;

3. When it appears during the litigation that the defendant is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights, respecting the subject of the action, and tending to render the judgment ineffectual. En. March, 11, 1872.

Cal. Rep. Cit. 53, 730; 64, 473; 113, 276; 114, 125; 136, 122. Subd. 2—118, 289.

Prac. Act, sec. 112. En. April 29, 1851.

When granted generally: Civ. Code, secs. 3422 et seq.

Where the obligation arises from a trust: Civ. Code, sec. 3422.

Illegal payments by county, enjoining: See Pol. Code, sec. 4001.

Enjoining nuisance: Sec. 731, post.

Trademark, use of enjoined: Pol. Code, sec. 3199.

Mortgage—Injunction to restrain party in possession from waste during foreclosure suit: Sec. 745.

Disobeying order or process, contempt, etc.: Secs. 1209, 1210.

An act to limit the meaning of the word conspiracy and the use of restraining orders and injunctions in disputes

between employer and employee was approved March 20, 1903: Stats 1903, c. 235. This act is set forth in Penal Code, Appendix, title Conspiracy.

§ 527. At what time it may be granted, and what is required to obtain it. The injunction may be granted at the time of issuing the summons upon the complaint, and at any time afterward, before judgment, upon affidavits. The complaint in the one case, and the affidavit in the other, must show satisfactorily that sufficient grounds exist therefor. No injunction can be granted on the complaint unless it is verified. When granted on the complaint, a copy of the complaint and verification attached must be served with the injunction; when granted upon affidavit, a copy of the affidavit must be served with the injunction. No injunction granted prior to the actual trial of the cause wherein it is granted shall continue in force for a longer period than twelve months from the time such injunction was granted, except by consent of the parties, or unless the cause be set for trial upon its merits. En. March 11, 1872. Am'd. 1895, 51.

Cal. Rep. Cit. 129, 61; 132, 325.

Prac. Act, sec. 113. En. April 29, 1851.

Cal. Rep. Cit. 19, 34; 20, 82; 35, 58; 35, 59.

Complaint—Verification of: Ante, sec. 446.

Service by sheriff: See sheriff's duties, Pol. Code, secs. 4175-4193.

§ 528. Injunction after answer. An injunction cannot be allowed after the defendant has answered, unless upon notice, or upon an order to show cause; but in such case the defendant may be restrained until the decision of the court or judge granting or refusing the injunction. En. March 11, 1872.

Cal. Rep. Cit. 146, 33.

Prac. Act, sec. 114. En. April 29, 1851.

§ 529. Security upon injunction. On granting an injunction, the court or judge must require, except when the people of the state, a county, or municipal corporation, or a married woman in a suit against her husband, is a party plaintiff, a written undertaking on the part of the plaintiff,

with sufficient sureties, to the effect that the plaintiff will pay to the party enjoined such damages, not exceeding an amount to be specified, as such party may sustain by reason of the injunction, if the court finally decide that the plaintiff was not entitled thereto. Within five days after the service of the injunction, the defendant may except to the sufficiency of the sureties. If he fails to do so, he is deemed to have waived all objections to them. When excepted to, the plaintiff sureties, upon notice to the defendant of not less than two nor more than five days, must justify before a judge or county clerk in the same manner as upon bail on arrest, and upon failure to justify, or if others in their place fail to justify at the time and place appointed, the order granting an injunction shall be dissolved. En. March 11, 1872. Am'd. 1873-4, 405; 1880, 62.

Cal. Rep. Cit. 54, 83; 64, 626; 77, 485; 92, 147; 97, 643; 146, 32.

Prac. Act, sec. 115. En. April 29, 1851.

Undertakings, returned on dismissal: Post, sec. 581, subd. 1.

Sureties, qualifications of: Post, sec. 1057; justification of: Ante, sec. 495.

Court commissioners, power to take bonds, and undertakings, examine sureties, etc.: Sec. 259, subd. 3.

§ 530. Order to show cause why injunction should not be granted. If the court or judge deem it proper that the defendant, or any of several defendants, should be heard before granting the injunction, an order may be made requiring cause to be shown, at a specified time and place, why the injunction should not be granted; and the defendant may, in the mean time, be restrained. In all actions pending or which may be hereafter brought, when an injunction or restraining order has been or may be granted, or applied for, to prevent the diversion pending the litigation, of water used or to be used for irrigation or domestic purposes only, if it be made to appear to the court that the plaintiff is entitled to the injunction, but that the issuance thereof pending the litigation will entail great damage upon the defendant, and that plaintiff can be fully compensated for such damages as he may suffer, the court may refuse the injunction upon the defendant giving a bond, such as is provided for in section 532; and upon

the trial the same proceedings shall be had, and with the same effect as in said section provided. En. March 11, 1872. Am'd. 1887, 241.

Cal. Rep. Cit. 64, 297; 70, 86; 75, 441; 101, 218; 110, 438; 146, 33.

Prac. Act, sec. 116. En. April 29, 1851.

Cal. Rep. Cit. 15, 109.

§ 531. Injunction to suspend business of a corporation, how and by whom granted. An injunction to suspend the general and ordinary business of a corporation cannot be granted except by the court or a judge thereof; nor can it be granted without due notice of the application therefor to the proper officers or managing agent of the corporation, except when the people of this state are a party to the proceeding. En. March 11, 1872.

Cal. Rep. Cit. 65, 189; 66, 163; 66, 314; 110, 145; 125, 299.

Prac. Act, sec. 117. En. April 29, 1851. Am'd. 1866, 703.

§ 532. Motion to vacate or modify injunction. If an injunction be granted without notice, the defendant at any time before the trial, may apply, upon reasonable notice to the judge who granted the injunction, or to the court in which the action is brought, to dissolve or modify the same. The application may be made upon the complaint and the affidavit on which the injunction was granted, or upon affidavit on the part of the defendant, with or without the answer. If the application be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other evidence in addition to those on which the injunction was granted. In all actions pending, or which may be hereafter brought, when an injunction or restraining order has been or may be granted or applied for, to prevent the diversion, pending the litigation, of water used or to be used for irrigation or domestic purposes only, if it be made to appear to the court that great damage will be suffered by the defendant in case the injunction is continued, and that the plaintiff can be fully compensated for any damages he may suffer by reason of the continuance of the acts of the defendant during the pendency of the litigation, the court, in its discretion, may dissolve or modify the injunction, upon the defendant giving a bond, with sureties to be approved by

the judge, and in such amount as may be fixed by the court or judge, conditioned that the defendant will pay all damages which the plaintiff may suffer by reason of the continuance during the litigation of the acts complained of. Upon the trial the amount of such damages shall be ascertained, and in case judgment is rendered for the plaintiff, the amount fixed as such damages shall be included in the judgment, together with reasonable attorney's fees. Upon a suit brought on the bond the amount of damages as fixed in said judgment shall be conclusive upon the sureties. En. March 11, 1872. Am'd. 1887, 241.

Cal. Rep. Cit. 72, 271; 72, 275; 133, 337; 134, 377; 147, 724.

Prac. Act, sec. 118. En. April 29, 1851.

Cal. Rep. Cit. 12, 448; 16, 85; 33, 390; 33, 391; 34, 34; 35, 58; 35, 59.

Vacating orders made out of court: Post, sec. 937.

§ 533. When to be vacated or modified. If upon such application it satisfactorily appear that there is not sufficient ground for the injunction, it must be dissolved; or if it satisfactorily appear that the extent of the injunction is too great, it must be modified. En. March 11, 1872

Cal. Rep. Cit. 103, 644.

Prac. Act, sec. 119. En. April 29, 1851.

CHAPTER IV.

ATTACHMENT.

- § 537. Attachment, when and in what cases may issue.
- § 538. Affidavit for attachment, what to contain.
- § 539. Undertaking on attachment.
- § 540. Writ, to whom directed and what to state.
- § 541. Shares of stock and debts due defendant, how attached and disposed of.
- § 542. How real and personal property shall be attached.
- § 543. Attorney to give written instructions to sheriff what to attach.
- § 544. Garnishment, when garnishee liable to plaintiff.
- § 545. Citation to garnishee to appear before a court or judge.
- § 546. Inventory, how made. Party refusing to give memorandum may be compelled to pay costs.
- § 547. Perishable property, how sold. Accounts without suit to be collected.
- § 548. Property attached may be sold as under execution, if the interest of the parties require.
- § 549. When property claimed by a third party, how tried.
- § 550. If plaintiff obtains judgment, how satisfied.
- § 551. When there remains a balance due, how collected.
- § 552. When suits may be commenced on the undertaking.
- § 553. If defendant recover judgment, what the sheriff is to deliver.
- § 554. Proceedings to release attachment, before whom taken.
- § 555. Attachment, in what cases it may be released and upon what terms.
- § 556. When a motion to discharge attachment may be made, and upon what grounds.
- § 557. When motion made on affidavit, it may be opposed by affidavit.
- § 558. When writ must be discharged.
- § 559. When writ to be returned.

§ 537. Attachment, when and in what cases may issue. The plaintiff, at the time of issuing the summons, or at any time afterward, may have the property of the defendant attached, as security for the satisfaction of any judgment that may be recovered, unless the defendant give security to pay such judgment, as in this chapter provided, in the following cases:

1. In an action upon a contract, express or implied, for the direct payment of money, where the contract is made or is payable in this state, and is not secured by any mortgage or lien upon real or personal property, or any pledge of personal property, or, if originally so secured, such security has, without any act of the plaintiff, or the person to whom the security was given, become valueless.

2. In an action upon a contract, express or implied, against a defendant not residing in this state.

3. In an action against a defendant, not residing in this state, to recover a sum of money as damages, arising from an injury to property in this state, in consequence of negli-

gence, fraud, or other wrongful act. En. March 11, 1872. Am'd. 1873-4, 306; 1905, 433.

Cal. Rep. Cit. 55, 501; 65, 361; 78, 39; 80, 107; 82, 602; 82, 632; 84, 157; 90, 102; 97, 95; 97, 100; 97, 207; 99, 13; 101, 106; 107, 485; 113, 477; 119, 195; 120, 410; 122, 148; 132, 129; 139, 640; 142, 138; 146, 732. Subd. 1—137, 648; 137, 649; 139, 639; 142, 137; 144, 788. Subd. 2—90, 102; 99, 12; 142, 137.

Prac. Act, sec. 120. En. April 29, 1851. Am'd. 1853, 276; 1858, 152; 1860, 300.

Cal. Rep. Cit. 1, 396; 6, 281; 8, 267; 8, 268; 32, 58; 33, 166; 35, 202; 37, 131; 45, 6.

Garnishment: Secs. 542, 543-545.

Preventing levy by counter-bond: See sec. 540.

Residence: See Pol. Code, sec. 52.

§ 538. Affidavit for attachment, what to contain. The clerk of the court must issue the writ of attachment, upon receiving an affidavit by or on behalf of plaintiff, showing:

1. That the defendant is indebted to the plaintiff (specifying the amount of such indebtedness over and above all legal set-offs or counterclaims) upon a contract, express or implied, for the direct payment of money, and that such contract was made or is payable in this state, and that the payment of the same has not been secured by any mortgage or lien upon real or personal property, or any pledge of personal property, or, if originally so secured, that such security has, without any act of the plaintiff, or the person to whom the security was given, become valueless; or,

2. That the defendant is indebted to the plaintiff (specifying the amount of such indebtedness over and above all legal set-offs or counterclaims) and that the defendant is a nonresident of the state; or,

3. That plaintiff's cause of action against defendant is one to recover a sum of money as damages (specifying the amount thereof) arising from an injury to property in this state in consequence of the negligence, fraud, or other wrongful act of defendant, and that the defendant is a nonresident of the state; and

4. That the attachment is not sought, and the action is not prosecuted, to hinder, delay, or defraud any creditor of the defendant. En. March 11, 1872. Am'd. 1873-4, 307; 1905, 434.

Cal. Rep. Cit. 57, 290; 77, 213; 78, 177; 80, 107; 84, 176; 89, 94; 99, 13; 101, 106; 106, 68; 107, 485; 107, 486;

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108, 177; 120, 413; 120, 414; 132, 129; 137, 649. Subd. 1—120, 410; 122, 148; 137, 419; 137, 648. Subd. 2—142, 138. Subd. 3—142, 138.

Prac. Act, sec. 121. En. April 29, 1851. Am'd. 1853, 277; 1858, 153; 1860, 301.

Cal. Rep. Cit. 25, 207; 33, 167.

Levy without process a misdemeanor: See Pen. Code, sec. 146.

Fact of issuing attachment not to be made public: See Pol. Code, sec. 1032.

Affidavit: Post, sec. 557.

§ 539. Undertaking on attachment. Before issuing the writ, the clerk must require a written undertaking on the part of the plaintiff in a sum not less than two hundred dollars and not exceeding the amount claimed by the plaintiff with sufficient sureties, to the effect that if the defendant recover judgment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking. Within five days after service of the summons in the action, the defendant may except to the sufficiency of the sureties. If he fails to do so he is deemed to have waived all objections to them. When excepted to, the plaintiff's sureties, upon notice to the defendant of not less than two nor more than five days, must justify before a judge or county clerk, in the same manner as upon bail on arrest; and upon failure to justify, or if others in their place fail to justify at the time and place appointed, the clerk or judge shall issue an order vacating the writ of attachment. En. March 11, 1872. Am'd. 1873-4, 308; 1873-4, 406.

Cal. Rep. Cit. 54, 296; 54, 297; 77, 213; 97, 55; 99, 13; 122, 151; 122, 208.

Prac. Act, sec. 122. En. April 29, 1851. Am'd. 1858, 153; 1860, 301.

Cal. Rep. Cit. 7, 518; 44, 170.

There was another section 539 adopted at the same session, amendments 1873-4, p. 308, but was repealed by the above: *Goodwin v. Buckley*, 54 Cal. 295.

Undertaking, generally: Sec. 581, subd. 1.

Sureties, justification of: Ante, secs. 259, subd. 3, 495; qualifications of: Sec. 1057.

Undertaking to discharge attachment: Post, sec. 555.

Counter-undertaking to prevent levy: Post, sec. 540.

Dismissal of action on—Clerk is to hand undertaking to defendant: Sec. 581, subd. 1.

§ 540. Writ, to whom directed and what to state. The writ must be directed to the sheriff of any county in which property of such defendant may be, and must require him to attach and safely keep all the property of such defendant within his county not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which must be stated in conformity with the complaint, unless the defendant give him security by the undertaking of at least two sufficient sureties, in an amount sufficient to satisfy such demand, besides costs, or in an amount equal to the value of the property which has been or is about to be attached; in which case, to take such undertaking. Several writs may be issued at the same time to the sheriffs of different counties. En. March 11, 1872.

Cal. Rep. Cit. 55, 377; 57, 159; 64, 406; 64, 407; 64, 408; 65, 38; 83, 395; 86, 372; 88, 107; 95, 448; 95, 449; 97, 98; 108, 177; 120, 413; 120, 414; 120, 621; 121, 421; 122, 97; 122, 151; 123, 245; 132, 126; 132, 129; 133, 112; 137, 648; 137, 649; 139, 413; 142, 139; 146, 779.

Prac. Act, sec. 123. En. April 29, 1851. Am'd. 1860, 315.

Writ, seal necessary to: Ante, sec. 153, subd. 1.

Sheriff, duties of, excused only by written directions: Pol. Code, sec. 4185; when must show process: Pol. Code, sec. 4188.

Exemptions from execution: Post, sec. 690.

Bond for release after appearance: Post, sec. 555.

§ 541. Shares of stock and debts due defendant, how attached and disposed of. The rights or shares which the defendant may have in the stock of any corporation or company, together with the interest and profit thereon, and all debts due such defendant, and all other property in this state of such defendant not exempt from execution, may be attached, and if judgment be recovered, be sold to satisfy the judgment and execution. En. March 11, 1872.

Cal. Rep. Cit. 57, 255; 144, 67.

Prac. Act, sec. 124. En. April 29, 1851.

Cal. Rep. Cit. 13, 22; 34, 87.

Stocks or shares, how attached: Post, sec. 542, subd. 4.

Debts and credits, etc., how attached: Post, sec. 542, subd. 5.

Garnishment, generally: Post, secs. 543-545.

§ 542. How real and personal property shall be attached. The sheriff to whom the writ is directed and delivered, must execute the same without delay, and if the undertaking mentioned in section five hundred and forty be not given, as follows:

1. Real property, standing upon the records of the county in the name of the defendant, must be attached, by filing with the recorder of the county a copy of the writ, together with a description of the property attached, and a notice that it is attached; and by leaving a similar copy of the writ, description, and notice with an occupant of the property, if there is one; if not, then by posting the same in a conspicuous place on the property attached.

2. Real property, or an interest therein, belonging to the defendant, and held by any other person, or standing on the records of the county in the name of any other person, must be attached, by filing with the recorder of the county a copy of the writ, together with a description of the property, and a notice that such real property, and any interest of the defendant therein, held by or standing in the name of such other person (naming him), are attached; and by leaving with the occupant, if any, and with such other person, or his agent, if known within the county, or at the residence of either, if within the county, a copy of the writ, with a similar description and notice. If there is no occupant of the property, a copy of the writ, together with such description and notice, must be posted in a conspicuous place upon the property. The recorder must index such attachment when filed, in the names, both of the defendant and of the person by whom the property is held or in whose name it stands on the records.

3. Personal property, capable of manual delivery, must be attached by taking it into custody.

4. Stocks or shares, or interest in stocks or shares, of any corporation or company, must be attached by leaving with the president, or other head of the same, or the secretary, cashier, or other managing agent thereof, a copy of the writ, and a notice stating that the stock or interest of the defendant is attached, in pursuance of such writ.

5. Debts and credits and other personal property, not capable of manual delivery, must be attached by leaving with the person owing such debts, or having in his possession, or under his control, such credits and other personal

property, or with his agent, a copy of the writ, and a notice that the debts owing by him to the defendant, or the credits and other personal property in his possession, or under his control, belonging to the defendant, are attached in pursuance of such writ, except in the case of attachment of growing crops, a copy of the writ, together with a description of the property attached, and a notice that it is attached, shall be recorded the same as in the attachment of real property. En. March 11, 1872. Am'd. 1903, 167.

Cal. Rep. Cit. 54, 342; 57, 195; 57, 256; 96, 267; 101, 227; 111, 238; 119, 198; 138, 194; 146, 742. Subd. 1—66, 208; 71, 306; 72, 496; 80, 466; 88, 107; 99, 166; 99, 644; 119, 193; 144, 788. Subd. 2—72, 497; 144, 788. Subd. 3—57, 255; 111, 381; 115, 213; 131, 89; 133, 317. Subd. 4—122, 469; 133, 317. Subd. 5—65, 303; 77, 655; 90, 568; 95, 531; 103, 655; 111, 235; 121, 351.

Prac. Act, sec. 125. En. April 29, 1851. Am'd. 1862, 568.

Cal. Rep. Cit. 1, 96; 8, 26; 19, 44; 34, 87; 34, 607; 38, 153; 38, 154; 43, 579.

Attachment lien, officer's: Civ. Code, sec. 3057; leviable interest, in mortgaged property: Civ. Code, secs. 2968-2970; fraudulent transfers: Civ. Code, secs. 1227, 3431, 3439-42.

§ 543. **Attorney to give written instructions to sheriff what to attach.** Upon receiving information in writing from the plaintiff or his attorney, that any person has in his possession or under his control any credits or other personal property belonging to the defendant, or is owing any debt to the defendant, the sheriff must serve upon such person a copy of the writ and a notice that such credits, or other property, or debts, as the case may be, are attached, in pursuance of such writ. En. March 11, 1872.

Cal. Rep. Cit. 90, 568; 108, 254.

Prac. Act, sec. 126. En. April 29, 1851.

Cal. Rep. Cit. 34, 298; 34, 299; 38, 153.

§ 544. **Garnishment, when garnishee liable to plaintiff.** All persons having in their possession or under their control any credits or other personal property belonging to the defendant, or owing any debts to the defendant, at the time of service upon them of a copy of the writ and notice, as provided in the last two sections, shall be, unless such property be delivered up or transferred, or such debts be paid to the sheriff, liable to the plaintiff for the amount of

such credits, property, or debts, until the attachment be discharged, or any judgment recovered by him be satisfied. En. March 11, 1872.

Cal. Rep. Cit. 88, 526; 90, 568; 109, 83; 116, 372; 116, 374; 128, 165; 128, 166; 128, 167; 138, 185; 138, 194; 144, 486.

Prac. Act, sec. 127. En. April 29, 1851.

Cal. Rep. Cit. 1, 96; 9, 266; 38, 612; 144, 486.

Similar provision as to execution: Post, sec. 716.

§ 545. Citation to garnishee to appear before a court or judge. Any person owing debts to the defendant, or having in his possession or under his control any credits or other personal property belonging to the defendant, may be required to attend before the court or judge, or a referee appointed by the court or judge, and be examined on oath respecting the same. The defendant may also be required to attend, for the purpose of giving information respecting his property, and may be examined on oath. The court or judge may, after such examination, order personal property, capable of manual delivery, to be delivered to the sheriff on such terms as may be just, having reference to any liens thereon or claims against the same, and a memorandum to be given of all other personal property, containing the amount and description thereof. En. March 11, 1872.

Cal. Rep. Cit. 51, 317; 90, 568; 128, 165; 128, 166; 128, 167; 133, 317.

Prac. Act, sec. 128. En. April 29, 1851. Am'd. 1855, 197.

Cal. Rep. Cit. 1, 96; 9, 265; 9, 266; 34, 607.

Compare, proceedings supplementary to execution: Post, secs. 714-721.

§ 546. Inventory, how made. Party refusing to give memorandum may be compelled to pay costs. The sheriff must make a full inventory of the property attached, and return the same with the writ. To enable him to make such return as to debts and credits attached, he must request, at the time of service, the party owing the debt or having the credit to give him a memorandum, stating the amount and description of each; and if such memorandum be refused, he must return the fact of refusal with the writ. The party refusing to give the memorandum may be

required to pay the costs of any proceedings taken for the purpose of obtaining information respecting the amounts and description of such debt or credit. En. March 11, 1872.

Cal. Rep. Cit. 58, 356; 90, 568; 128, 166; 128, 167.

Prac. Act, sec. 129. En. April 29, 1851.

Return of writ, generally: See *infra*, sec. 559.

§ 547. Perishable property, how sold. Accounts with-out suit to be collected. If any of the property attached be perishable, the sheriff must sell the same in the manner in which such property is sold on execution. The proceeds and other property attached by him must be retained by him to answer any judgment that may be recovered in the action, unless sooner subjected to execution upon another judgment, recovered previous to the issuing of the attachment. Debts and credits attached may be collected by him, if the same can be done without suit. The sheriff's receipt is a sufficient discharge for the amount paid. En. March 11, 1872.

Cal. Rep. Cit. 135, 98; 135, 99.

Prac. Act, sec. 130. En. April 29, 1851.

Cal. Rep. Cit. 1, 96; 9, 551.

§ 548. Property attached may be sold as under execution, if the interest of the parties require. Whenever property has been taken by an officer under a writ of attachment, and it is made to appear satisfactorily to the court or a judge thereof, that the interest of the parties to the action will be subserved by a sale thereof, the court or judge may order such property to be sold in the same manner as property is sold under an execution, and the proceeds to be deposited in the court, to abide the judgment in the action. Such order can be made only upon notice to the adverse party or his attorney, in case such party has been personally served with a summons in the action. En. March 11, 1872. Am'd. 1880, 4.

Cal. Rep. Cit. 135, 99.

§ 549. When property claimed by a third party, how tried. If any personal property attached be claimed by a third person as his property, the same rules shall prevail as

to the contents and making of said claim, and as to the holding of said property, as in case of a claim after levy upon execution, as provided for in section six hundred and eighty-nine of the Code of Civil Procedure. En. March 11, 1872. Am'd. 1891, 20.

Cal. Rep. Cit. 97, 483; 117, 40; 122, 334; 126, 42; 142, 459.

Prac. Act, sec. 131. En. April 29, 1851.

Sureties on indemnity.—If sheriff gives to sureties notice of action brought against him, the sureties are liable on the judgment: Post, sec. 1055.

§ 550. If plaintiff obtains judgment, how satisfied. If judgment be recovered by the plaintiff, the sheriff must satisfy the same out of the property attached by him which has not been delivered to the defendant or a claimant as hereinbefore provided, or subjected to execution on another judgment, recovered previous to the issuing of the attachment, if it be sufficient for that purpose:

1. By paying to the plaintiff the proceeds of all sales of perishable property sold by him, or of any debts or credits collected by him, or so much as shall be necessary to satisfy the judgment;

2. If any balance remain due, and an execution shall have been issued on the judgment, he must sell under the execution so much of the property, real or personal, as may be necessary to satisfy the balance, if enough for that purpose remain in his hands. Notices of the sales must be given, and the sales conducted as in other cases of sales on execution. En. March 11, 1872.

Cal. Rep. Cit. 72, 70; 122, 471.

Prac. Act, sec. 132. En. April 29, 1851.

Cal. Rep. Cit. 9, 551.

Disposition of proceeds.—Action against sheriff for amount, and twenty-five per cent damages, and ten per cent per month interest, if he neglect to pay over moneys: Pol. Code, sec. 4181; preference, claim for labor, wages, etc., sec. 1206.

Sales on execution: Post, secs. 692-709.

§ 551. When there remains a balance due, how collected. If, after selling all the property attached by him remaining in his hands, and applying the proceeds, together with the proceeds of any debts or credits collected

by him, deducting his fees, to the payment of the judgment, any balance shall remain due, the sheriff must proceed to collect such balance as upon an execution in other cases. Whenever the judgment shall have been paid, the sheriff, upon reasonable demand, must deliver over to the defendant the attached property remaining in his hands, and any proceeds of the property attached unapplied on the judgment. En. March 11, 1872.

Prac. Act, sec. 133. En. April 29, 1851.

Cal. Rep. Cit. 45, 616.

Proceedings supplementary to execution: Post, secs. 714 et seq.

§ 552. When suits may be commenced on the undertaking. If the execution be returned unsatisfied in whole or in part, the plaintiff may prosecute any undertaking given pursuant to section five hundred and forty, or section five hundred and fifty-five, or he may proceed as in other cases upon the return of an execution. En. March 11, 1872.

Cal. Rep. Cit. 57, 159; 71, 306; 79, 559; 95, 448; 95, 449; 123, 245.

Prac. Act, sec. 134. En. April 29, 1851.

§ 553. If defendant recover judgment, what the sheriff is to deliver. If the defendant recover judgment against the plaintiff, any undertaking received in the action, all the proceeds of sales and money collected by the sheriff, and all the property attached remaining in the sheriff's hands, must be delivered to the defendant or his agent. The order of attachment shall be discharged, and the property released therefrom. En. March 11, 1872.

Cal. Rep. Cit. 76, 564; 76, 565; 123, 94; 123, 96; 133, 112; 133, 113.

Prac. Act, sec. 135. En. April 29, 1851.

§ 554. Proceedings to release attachment, before whom taken. Whenever the defendant has appeared in the action he may, upon reasonable notice to the plaintiff, apply to the court in which the action is pending, or to the judge thereof, for an order to discharge the attachment, wholly or in part; and upon the execution of the undertaking mentioned in the next section, an order may be made, releasing

from the operation of the attachment any or all of the property attached; and all of the property so released, and all of the proceeds of the sales thereof, must be delivered to the defendant, upon the justification of the sureties on the undertaking, if required by the plaintiff. En. March 11, 1872. Am'd. 1880, 4.

Cal. Rep. Cit. 63, 540; 64, 407; 72, 554; 79, 558; 86, 372; 95, 448; 119, 49; 123, 94; 123, 242; 123, 244; 123, 245; 134, 511; 134, 512; 139, 411; 139, 413.

Prac. Act, sec. 136. En. April 29, 1851. Am'd. 1854, 61; 1863, 305.

Cal. Rep. Cit. 1, 337; 28, 651; 31, 270.

Appearance: Post, sec. 1014.

§ 555. Attachment, in what cases it may be released and upon what terms. Before making such order, the court or judge must require an undertaking on behalf of the defendant, by at least two sureties, residents and freeholders, or householders, in the state, to the effect that in case the plaintiff recover judgment in the action, defendant will, on demand, redeliver the attached property so released to the proper officer, to be applied to the payment of the judgment, or in default thereof, that the defendant and sureties will, on demand, pay to the plaintiff the full value of the property released. The court or judge making such order may fix the sum for which the undertaking must be executed, and if necessary in fixing such sum to know the value of the property released, the same may be appraised by one or more disinterested persons, to be appointed for that purpose. The sureties may be required to justify before the court or judge, and the property attached cannot be released from the attachment without their justification, if the same be required. En. March 11, 1872. Am'd. 1873-4, 308.

Cal. Rep. Cit. 54, 504; 57, 159; 58, 344; 63, 540; 72, 554; 78, 448; 79, 558; 79, 560; 86, 372; 95, 448; 95, 449; 119, 49; 119, 51; 123, 94; 123, 242; 123, 245; 134, 511; 139, 413.

Prac. Act, sec. 137. En. April 29, 1851. Am'd. 1854, 61; 1863, 305; 1864, 44.

Cal. Rep. Cit. 1, 334; 1, 335; 11, 276; 22, 634.

Undertaking to prevent attachment: Sec. 540.

Court commissioners, power to take bonds, examine sureties, etc.: Sec. 259, subd. 3.

Sureties, qualifications of: Ante, sec. 494; post, sec. 1057.

Justification: Ante, secs. 259, subd. 3, 494; post, sec. 941.

§ 556. When a motion to discharge attachment may be made and upon what grounds. The defendant may also at any time, either before or after the release of the attached property, or before any attachment shall have been actually levied, apply on motion, upon reasonable notice to the plaintiff, to the court in which the action is brought, or to a judge thereof, that the writ of attachment be discharged on the ground that the same was improperly or irregularly issued. En. March 11, 1872. Am'd. 1873-4, 309; 1880, 4.

Cal. Rep. Cit. 63, 183; 72, 554; 76, 290; 97, 99; 122, 96; 137, 418; 137, 419; 139, 639; 145, 783.

Prac. Act, sec. 138. En. April 29, 1851. Am'd. 1854, 61; 1858, 153; 1860, 301.

Cal. Rep. Cit. 38, 210.

§ 557. When motion made on affidavit, it may be opposed by affidavit. If the motion be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other evidence, in addition to those on which the attachment was made. En. March 11, 1872.

Cal. Rep. Cit. 84, 176; 89, 486; 137, 418.

Prac. Act, sec. 139. En. April 29, 1851. Am'd. 1858, 153; 1860, 301.

On affidavits, compare application to dissolve injunction: Ante, sec. 532.

§ 558. When writ must be discharged. If, upon such application, it satisfactorily appears that the writ of attachment was improperly or irregularly issued, it must be discharged. En. March 11, 1872.

Cal. Rep. Cit. 72, 554; 97, 99; 122, 209; 137, 418; 137, 419.

Prac. Act, sec. 140. En. April 29, 1851. Am'd. 1858, 154; 1860, 301.

Cal. Rep. Cit. 74, 567.

§ 559. When writ to be returned. The sheriff must return the writ of attachment with the summons, if issued at the same time; otherwise, within twenty days after its receipt, with a certificate of his proceedings indorsed thereon or attached thereto; and whenever an order has been made discharging or releasing an attachment upon real property, a certified copy of such order may be filed in the offices of the county recorders in which the notices of attachment have been filed, and be indexed in like manner. En. March 11, 1872. Am'd. 1875-6, 91.

Cal. Rep. Cit. 80, 466; 139, 413; 146, 779.

Prac. Act, sec. 141. En. April 29, 1851.

Cal. Rep. Cit. 43, 580.

Notices of attachment filed: Ante, sec. 542, subds. 1, 2.

Return of inventory with writ: See supra, sec. 546.

§560
Am'd.
p. 445

CHAPTER V.

RECEIVERS.

- § 564. Appointment of receiver.
- 565. Appointment of receivers upon dissolution of corporations.
- 566. Who shall not be appointed.
- 567. Oath and undertaking.
- 568. Powers of receivers.
- 569. Investment of funds.

§ 564. Appointment of receiver. A receiver may be appointed by the court in which an action is pending, or by the judge thereof:

1. In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to his claim, or between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff, or of any party whose right to or interest in the property or fund, or the proceeds thereof, is probable, and where it is shown that the property or fund is in danger of being lost, removed, or materially injured;

2. In an action by a mortgagee for the foreclosure of his mortgage and sale of the mortgaged property, where it appears that the mortgaged property is in danger of being lost, removed, or materially injured, or that the condition of the mortgage has not been performed, and that the prop-

erty is probably insufficient to discharge the mortgage debt;

3. After judgment, to carry the judgment into effect;

4. After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or in proceedings in aid of execution, when an execution has been returned unsatisfied, or when the judgment debtor refuses to apply his property in satisfaction of the judgment;

5. In the cases when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights;

6. In all other cases where receivers have heretofore been appointed by the usages of courts of equity. En. March 11, 1872.

Cal. Rep. Cit. 53, 551; 53, 553; 53, 554; 54, 287; 54, 288; 55, 456; 56, 29; 56, 627; 60, 227; 71, 272; 72, 573; 75, 322; 84, 356; 84, 357; 84, 360; 84, 374; 95, 278; 108, 435; 110, 141; 120, 618; 121, 545; 123, 237; 123, 238; 129, 565; 130, 599; 138, 238; 144, 662. Subd. 2—57, 624; 65, 423; 98, 495; 99, 410; 115, 94; 120, 615; 121, 544; 123, 235; 123, 236; 129, 565; 144, 660. Subd. 3—110, 144; 121, 41; 130, 599. Subd. 4—57, 522; 72, 575; 78, 358. Subd. 5—53, 550; 84, 355; 85, 36; 110, 140; 129, 632. Subd. 6—66, 615; 85, 36; 95, 276; 115, 274.

Prac. Act, sec. 143. En. April 29, 1851. Am'd. 1854, 61.

Cal. Rep. Cit. 20, 55; 22, 193; 25, 16; 54, 287; 54, 288; 54, 289.

§ 565. Appointment of receivers upon dissolution of corporations. Upon the dissolution of any corporation, the superior court of the county in which the corporation carries on its business, or has its principal place of business, on application of any creditor of the corporation, or of any stockholder or member thereof, may appoint one or more persons to be receivers or trustees of the corporation, to take charge of the estate and effects thereof, and to collect the debts and property due and belonging to the corporation, and to pay the outstanding debts thereof, and to divide the moneys and other property that shall remain over, among the stockholders or members. En. March 11, 1872. Am'd. 1880, 4.

Cal. Rep. Cit. 84, 366; 84, 369; 84, 370; 84, 380; 100, 119; 101, 148; 108, 435; 108, 437; 129, 631.

Dissolution, involuntary: Civ. Code, secs. 399, 400, and this code, post, secs. 802 et seq.; voluntary: Post, secs. 1227 et seq.

566
m'd.
445 § 566. Who shall not be appointed. No party, or attorney, or person interested in an action, or related to any judge of the court by consanguinity or affinity within the third degree, can be appointed receiver therein without the written consent of the parties, filed with the clerk. If a receiver be appointed upon an ex parte application, the court, before making the order, may require from the applicant an undertaking, with sufficient sureties, in an amount to be fixed by the court, to the effect that the applicant will pay to the defendant all damages he may sustain by reason of the appointment of such receiver and the entry by him upon his duties, in case the applicant shall have procured such appointment wrongfully, maliciously, or without sufficient cause; and the court may, in its discretion, at any time after said appointment, require an additional undertaking. En. March 11, 1872. Am'd. 1873-4, 309; 1897, 60.

Cal. Rep. Cit. 56, 627; 60, 227; 64, 626; 84, 366.

567
m'd.
445 § 567. Oath and undertaking. Before entering upon his duties, the receiver must be sworn to perform them faithfully, and with one or more sureties, approved by the court or judge, execute an undertaking to such person, and in such sum as the court or judge may direct, to the effect that he will faithfully discharge the duties of receiver in the action, and obey the orders of the court therein. En. March 11, 1872.

Undertaking, generally.—By Political Code, sec. 981, “the provisions of this article apply to the bonds of receivers, executors, administrators, and guardians.” The article referred to is part 3, c. 7, art. 9, and comprises Political Code, secs. 947 to 986 inclusive. Many of those provisions seem quite inapplicable to the undertaking of receivers, etc., and want of space prevents the insertion of the whole in this place. By Political Code, sec. 982, bonds or undertakings given by trustees, receivers, assignees, or officers of a court, are to be in the name of the state of California, and may by order of the court be prosecuted for the benefit of any person interested. Undertakings, generally: Post, sec. 941.

§ 568. Powers of receivers. The receiver has, under the control of the court, power to bring and defend actions in his own name, as receiver; to take and keep possession of the property, to receive rents, collect debts, to compound for and compromise the same, to make transfers, and generally to do such acts respecting the property as the court may authorize. En. March 11, 1872.

Cal. Rep. Cit. 84, 11; 91, 455; 113, 515; 116, 366; 116, 367; 120, 475.

§ 569. Investment of funds. Funds in the hands of a receiver may be invested upon interest, by order of the court; but no such order can be made, except upon the consent of all the parties to the action. En. March 11, 1872.

Cal. Rep. Cit. 56, 627.

CHAPTER VI.

DEPOSIT IN COURT.

§ 572. Deposit in court.

§ 573. Money paid to clerk must be deposited with county treasurer.

§ 574. Manner of enforcing the order.

§ 572. Deposit in court. When it is admitted by the pleading, or shown upon the examination of a party, that he has in his possession, or under his control, any money or other thing capable of delivery, which, being the subject of litigation, is held by him as trustee for another party, or which belongs or is due to another party, the court may order the same, upon motion, to be deposited in court or delivered to such party, upon such conditions as may be just, subject to the further direction of the court. En. March 11, 1872.

Cal. Rep. Cit. 51, 446; 71, 271; 71, 272; 71, 273; 73, 269; 146, 386.

Prac. Act, sec. 142. En. April 29, 1851.

Deposit with clerk: See, further, post, sec. 2104.

§ 573. Money paid to clerk must be deposited with county treasurer. If the money is deposited in court, it must be paid to the clerk, who must deposit it with the

county treasurer, by him to be held subject to the order of the court. For the safekeeping of the money deposited with him the treasurer is liable on his official bond. En. March 11, 1872.

Cal. Rep. Cit. 51, 446; 73, 269.

Deposit with clerk: Post, sec. 2104.

§ 574. Manner of enforcing the order. Whenever in the exercise of its authority, a court has ordered the deposit or delivery of money or other thing, and the order is disobeyed, the court, beside punishing the disobedience, may make an order requiring the sheriff to take the money or thing and deposit or deliver it in conformity with the direction of the court. En. March 11, 1872.

Cal. Rep. Cit. 51, 446; 57, 522; 99, 275.

Punishing the disobedience, contempt: Sec. 1209.

Sheriff's duties, as to official moneys: Pol. Code, sec. 4181.

TITLE VIII.

OF THE TRIAL AND JUDGMENT IN CIVIL ACTIONS.

Chapter I. Judgment in General, §§ 577-582.

II. Judgment Upon Failure to Answer, § 585.

III. Issues—The Modes of Trial and Postponements, §§ 588-596.

IV. Trial by Jury, §§ 600-628.

V. Trial by the Court, §§ 631-636.

VI. Of References and Trials by Referees, §§ 638-645.

VII. Provisions Relating to Trials in General, §§ 646-663½.

VIII. The Manner of Giving and Entering Judgment, §§ 664-680½.

CHAPTER I.

JUDGMENT IN GENERAL.

§ 577. Judgment defined.

§ 578. Judgment may be for or against one of the parties.

§ 579. Judgment may be against one party and action proceed as to others.

§ 580. The relief to be awarded to the plaintiff.

§ 581. Action may be dismissed or nonsuit entered.

§ 582. All other judgments are on the merits.

§ 583. Dismissal of actions.

§ 577. Judgment defined. A judgment is the final determination of the rights of the parties in an action or proceeding. En. March 11, 1872.

Cal. Rep. Cit. 63, 508; 80, 170; 89, 486; 93, 651; 98, 639; 99, 282; 119, 440; 125, 68; 128, 167; 133, 108; 134, 124; 134, 468; 147, 128.

Prac. Act, sec. 144. En. April 29, 1851.

Cal. Rep. Cit. 3, 215; 12, 468; 20, 55; 20, 56; 27, 234; 28, 85; 44, 87; 46, 208.

Judgment, confession, by: Post, sec. 1132; default, by: Post, sec. 585; demurrer, on: Post, sec. 636; estoppel as to: Post, sec. 1908; generally: Post, sec. 664; nonsuit: Post, sec. 581; on trial by court: Post, sec. 633; on trial by jury: Post, sec. 664.

Order defined: Post, sec. 1003.

Final judgment: See, also, post, secs. 664, 939.

Code Civil Proc.—14.

§ 578. Judgment may be for or against one of the parties. Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants, and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side, as between themselves. En. March 11, 1872.

Cal. Rep. Cit. 58, 607; 71, 447; 71, 451; 78, 256; 82, 583; 110, 492; 136, 71; 136, 302; 146, 575; 147, 437.

Prac. Act, sec. 145. En. April 29, 1851.

Cal. Rep. Cit. 18, 400; 82, 583.

Striking out party: Ante, sec. 473.

Fresh parties, bringing in: Ante, sec. 389.

Service on one defendant out of several, effect of: Ante, sec. 414.

Joint debtors, proceedings against: Post, secs. 989 et seq.

Joining persons severally liable on same instrument: Ante, sec. 383.

Association, action against persons under name of: Ante, sec. 388.

§ 579. Judgment may be against one party and action proceed as to others. In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper. En. March 11, 1872.

Cal. Rep. Cit. 103, 36; 136, 302.

Prac. Act, sec. 146. En. April 29, 1851.

Cal. Rep. Cit. 6, 183; 24, 382.

Striking out party: Ante, sec. 473.

Fresh parties, bringing in: Ante, sec. 389.

Service on one defendant out of several, effect of: Ante, sec. 414.

Joint debtors, proceedings against: Post, secs. 989 et seq.

Joining persons severally liable on same instrument: Ante, sec. 383.

§ 580. The relief to be awarded to the plaintiff. The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; but in any other case, the court may grant him any relief consistent with the case made by the complaint and embraced within the issue. En. March 11, 1872.

Cal. Rep. Cit. 53, 288; 57, 326; 63, 106; 65, 55; 65, 353; 70, 333; 72, 249; 75, 522; 78, 40; 99, 68; 99, 244; 99, 418; 100, 625; 105, 453; 107, 255; 110, 492; 116, 324; 116, 377; 117, 220; 120, 43; 122, 398; 125, 312; 125, 313; 125, 557; 125, 558; 126, 341; 126, 342; 126, 424; 128, 319; 129, 179; 130, 406; 131, 48; 132, 697; 132, 698; 133, 230; 133, 494; 136, 29; 141, 364; 142, 63; 144, 67; 144, 775; 146, 11; 146, 416.

Prac. Act, sec. 147. En. April 29, 1851.

Cal. Rep. Cit. 11, 19; 20, 92; 28, 294; 32, 650; 34, 81; 37, 528; 41, 256; 117, 220.

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§ 581. Action may be dismissed or nonsuit entered. An action may be dismissed, or a judgment of nonsuit entered, in the following cases:

1. By the plaintiff himself, by written request to the clerk, filed among the papers in the case, at any time before trial, upon payment of costs; provided, a counterclaim has not been made, or affirmative relief sought by the cross-complaint or answer of the defendant. If a provisional remedy has been allowed, the undertaking must thereupon be delivered by the clerk to the defendant, who may have his action thereon;

2. By either party upon the written consent of the other;

3. By the court, when the plaintiff fails to appear on the trial, and the defendant appears and asks for the dismissal;

4. By the court, when, upon the trial and before the final submission of the case, the plaintiff abandons it;

5. By the court, upon motion of the defendant, when upon the trial the plaintiff fails to prove a sufficient case for the jury;

6. By the court, when, after verdict or final submission, the party entitled to judgment neglects to demand and have the same entered for more than six months.

The dismissals mentioned in subdivisions one and two hereof are made by entry in the clerk's register.

The dismissals mentioned in subdivisions three, four, five, and six of this section, shall be made by orders of the court entered upon the minutes thereof, and shall be effective for all purposes when so entered, but the clerk of the court shall note such orders in his register of actions in the case.

7. And no action heretofore or hereafter commenced shall be further prosecuted, and no further proceedings shall be had therein, and all actions heretofore or hereafter commenced shall be dismissed by the court in which the

same shall have been commenced, on its own motion, or on motion of any party interested therein, whether named in the complaint as a party or not, unless summons shall have been issued within one year, and all such actions shall be in like manner dismissed, unless the summons shall be served and return thereon made within three years after the commencement of said action. But all such actions may be prosecuted, if appearance has been made by the defendant or defendants, within said three years in the same manner as if summons had been issued and served. En. March 11, 1872. Am'd. 1877-8, 100; 1885, 76; 1889, 398; 1895, 31; 1897, 98.

Cal. Rep. Cit. 58, 190; 77, 84; 82, 415; 93, 509; 93, 511; 99, 339; 102, 614; 113, 304; 113, 306; 118, 224; 125, 300; 125, 392; 126, 300; 126, 301; 127, 523; 127, 524; 129, 250; 129, 672; 132, 83; 132, 436; 135, 672; 136, 316; 136, 554; 136, 555; 137, 272; 137, 657; 140, 34; 140, 174; 141, 9; 141, 55; 141, 655; 141, 667; 144, 655; 146, 750; 147, 502; 147, 605. Subd. 1—53, 32; 65, 97; 65, 266; 66, 350; 67, 590; 76, 373; 82, 415; 90, 216; 90, 391; 106, 62; 115, 155; 116, 667; 118, 221; 125, 264; 132, 434; 132, 435; 134, 62; 135, 668; 136, 316; 136, 553; 139, 94; 140, 377; 141, 284; 145, 570. Subd. 2—104, 667. Subd. 3—77, 327; 122, 384; 125, 214; 126, 298; 129, 672. Subd. 4—56, 588; 91, 356; 123, 386; 126, 299; 129, 672. Subd. 5—53, 370; 53, 388; 113, 692; 129, 672. Subd. 6—75, 566; 77, 459; 97, 425; 110, 227; 126, 247; 126, 324; 126, 609; 129, 672. Subd. 7—99, 385; 100, 512; 113, 303; 119, 177; 125, 299; 128, 256; 132, 82; 132, 455; 132, 507; 132, 508; 137, 271; 141, 7; 141, 578; 141, 655; 144, 427.

Prac. Act, sec. 148. En. April 29, 1851.

Cal. Rep. Cit. 13, 637; 18, 77; 20, 93; 22, 102; 22, 465; 25, 276; 25, 277; 28, 169; 35, 302; 47, 546; 47, 547; 126, 299; 135, 668.

581a Dismissal for want of prosecution: See post, sec. 583.

nact. Variance, fatal or otherwise: Ante, secs. 469-471.

446 Trial—Either party may bring on: Post, sec. 594.

§ 582. All other judgments are on the merits. In every case, other than those mentioned in the last section, judgment must be rendered on the merits. En. March 11, 1872.

Cal. Rep. Cit. 58, 190; 93, 509; 94, 469; 118, 224; 125, 214; 126, 299; 126, 300; 129, 250.

§ 582 Prac. Act, sec. 149. En. April 29, 1851.

Am'd. Cal. Rep. Cit. 25, 277; 47, 548; 126, 299.

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§ 583. Dismissal of actions. The court may in its discretion dismiss any action for want of prosecution on motion of the defendant and after due notice to the plaintiff, whenever plaintiff has failed for two years after answer filed to bring such action to trial. Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of the defendant, after due notice to plaintiff or by the court on its own motion, unless such action is brought to trial within five years after the defendant has filed his answer, except where the parties have stipulated in writing that the time may be extended. En. Stats. 1905, 244.

CHAPTER II.

JUDGMENT UPON FAILURE TO ANSWER.

§ 585. In what cases judgment may be had upon the failure of the defendant to answer.

85 § 585. In what cases judgment may be had upon the
 'd. failure of the defendant to answer. Judgment may be
 47 had, if the defendant fail to answer the complaint, as follows:

1. In an action arising upon contract for the recovery of money or damages only, if no answer has been filed with the clerk of the court within the time specified in the summons; or such further time as may have been granted, the clerk, upon application of the plaintiff, must enter the default of the defendant, and immediately thereafter enter judgment for the amount demanded in the prayer of the complaint, including the costs, against the defendant, or against one or more of several defendants in the cases provided for in section four hundred and fourteen;

2. In other actions, if no answer has been filed with the clerk of the court within the time specified in the summons, or such further time as may have been granted, the clerk must enter the default of the defendant; and thereafter the plaintiff may apply to the court for the relief demanded in the complaint. If the taking of an account, or the proof of any fact, is necessary, to enable the court to give judgment, or to carry the judgment into effect, the court may take the account or hear the proof; or may, in its discretion, order a reference for that purpose. And where the action is for the recovery of damages, in whole

or in part, the court may order the damages to be assessed by a jury; or if, to determine the amount of damages, the examination of a long account be involved, by a reference as above provided;

3. In actions where the service of the summons was by publication, the plaintiff, upon the expiration of the time for answering, may, upon proof of the publication, and that no answer has been filed, apply for judgment; and the court must thereupon require proof to be made of the demand mentioned in the complaint; and if the defendant be not a resident of the state, must require the plaintiff, or his agent, to be examined on oath, respecting any payments that have been made to the plaintiff, or to any one for his use, on account of such demand, and may render judgment for the amount which he is entitled to recover. En. March 11, 1872. Am'd. 1905, 42.

Cal. Rep. Cit. 53, 254; 64, 204; 68, 425; 68, 427; 68, 428; 90, 507; 103, 207; 136, 363. Subd. 1—108, 30; 108, 31; 111, 551; 136, 557; 136, 574; 144, 4. Subd. 2—136, 363; 136, 574. Subd. 3—137, 427.

Prac. Act, sec. 150. En. April 29, 1851.

Cal. Rep. Cit. 4, 256; 6, 156; 7, 450; 17, 566; 28, 214; 32, 635; 32, 636; 34, 27; 68, 427.

As to validity of service of summons: Sec. 411.

Names, fictitious, amending, etc.: Sec. 474.

Appeal: Sec. 939.

Award, judgment on: Sec. 1286.

Confession, judgment by: Post, secs. 1132 et seq.

Dollars and cents, without fractions, money judgments must be in: Pol. Code, sec. 3274.

Gold coin, judgment in: Post, sec. 667.

Judgment, generally, docketing, satisfaction, etc.: Post, secs. 664-675.

Judgment, void, etc., setting aside: Ante, sec. 473.

Objections, waiver of, by not demurring or answering: Ante, sec. 434.

Pending, action when: Post, sec. 1049.

CHAPTER III.

ISSUES—THE MODE OF TRIAL AND POSTPONEMENTS.

- § 588. Issue defined, and the different kinds.
- § 589. Issue of law, how raised.
- § 590. Issue of fact, how raised.
- § 591. Issue of law, how tried.
- § 592. Issue of fact, how tried. When issues both of law and fact, the former to be first disposed of.
- § 593. Clerk must enter causes on the calendar, to remain until disposed of.
- § 594. Parties may bring issue to trial.
- § 595. Motion to postpone a trial for absence of testimony, requisites of.
- § 596. In cases of adjournment a party may have the testimony of any witness taken.

§ 588. Issue defined, and the different kinds. Issues arise upon the pleadings when a fact or conclusion of law is maintained by the one party, and is controverted by the other. They are of two kinds:

1. Of law; and,
2. Or fact. En. March 11, 1872.

Cal. Rep. Cit. 88, 227; 88, 315; 93, 619; 132, 11; 135, 669; Subd. 2—120, 37.

Prac. Act, sec. 151. En. April 29, 1851.

Issues of law and fact: See post, secs. 589, 590.

§ 589. Issue of law, how raised. An issue of law arises upon a demurrer to the complaint or answer, or to some part thereof. En. March 11, 1872.

Cal. Rep. Cit. 88, 227.

Prac. Act, sec. 152. En. April 29, 1851. Am'd. 1854, 62.

Cal. Rep. Cit. 1, 334; 1, 335.

§ 590. Issue of fact, how raised. An issue of fact arises:

1. Upon a material allegation in the complaint, controverted by the answer; and,
2. Upon new matters in the answer, except an issue of law is joined thereon. En. March 11, 1872.

Cal. Rep. Cit. 88, 227; 99, 270; 108, 455; 124, 215; 125, 16; 125, 204; 132, 11. Subd. 1, 120, 37.

Prac. Act, sec. 153. En. April 29, 1851. Am'd. 1854, 62.

Cal. Rep. Cit. 41, 404.

§ 591. Issue of law, how tried. An issue of law must be tried by the court, unless it is referred upon consent. En. March 11, 1872.

Cal. Rep. Cit. 135, 669.

Prac. Act, sec. 154. En. April 29, 1851.

Trial by court, generally: Post, secs. 631 et seq.

§ 592. Issue of fact, how tried. When issues both of law and fact, the former to be first disposed of. In actions for the recovery of specific real or personal property, with or without damages, or for money claimed as due upon contract, or as damages for breach of contract, or for injuries, an issue of fact must be tried by a jury, unless a jury trial is waived, or a reference is ordered, as provided in this code. Where in these cases there are issues both of law and fact, the issue of law must be first disposed of. In other cases, issues of fact must be tried by the court, subject to its power to order any such issue to be tried by a jury, or to be referred to a referee, as provided in this code. En. March 11, 1872. Am'd. 1873-4, 309.

Cal. Rep. Cit. 50, 506; 64, 56; 64, 473; 68, 264; 88, 183; 89, 598; 104, 288; 104, 372; 109, 444; 127, 201; 128, 523; 130, 521; 146, 420.

Prac. Act, sec. 155. En. April 29, 1851.

Generally, as to jury trial: Post, secs. 600-628.

Waiver of jury trial: Post, sec. 631.

Reference: Post, secs. 638-645.

Court, trial by: Post, secs. 631-636.

§ 593. Clerk must enter causes on the calendar, to remain until disposed of. The clerk must enter causes upon the calendar of the court according to the date of issue. Causes once placed on the calendar must remain upon the calendar until finally disposed of; provided, that causes may be dropped from the calendar by consent of parties, and may be again restored upon notice. En. March 11, 1872. Am'd. 1880, 5.

Prac. Act, sec. 156. En. April 29, 1851.

Cal. Rep. Cit. 48, 425.

Mandamus to compel clerk to perform duty: Post, sec. 1085.

Issue, generally: Ante, sec. 538.

Abolition of terms: See Const. Cal., art. 6, sec. 5.

§ 594. Parties may bring issue to trial. Either party may bring an issue to trial or to a hearing, and in the absence of the adverse party, unless the court, for good cause, otherwise direct, may proceed with his case, and take a dismissal of the action, or a verdict or judgment, as the case may require; provided, however, if the issue to be tried is an issue of fact, proof must first be made

to the satisfaction of the court that the adverse party has had five days' notice of such trial. En. March 11, 1872. Am'd. 1899, 5.

Cal. Rep. Cit. 83, 230; 101, 178; 125, 214; 129, 685; 133, 419; 146, 214.

Prac. Act, sec. 157. En. April 29, 1851.

Cal. Rep. Cit. 50, 552.

Dismissal: Ante, sec. 581.

Surprise, setting aside judgment for: Ante, sec. 473.

Surprise, new trial: Post, sec. 657.

§ 595. **Motion to postpone a trial for absence of testimony, requisites of.** A motion to postpone a trial on the ground of the absence of evidence can only be made upon affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it. A trial shall be postponed when it appears to the court that the attorney of record, party, or principal witness is actually engaged in attendance upon a session of the legislature of this state as a member thereof. The court may require the moving party, where application is made on account of the absence of a material witness, to state upon affidavit the evidence which he expects to obtain; and if the adverse party thereupon admits that such evidence would be given, and that it be considered as actually given on the trial, or offered and overruled as improper, the trial must not be postponed. En. March 11, 1872. Am'd. 1880, 1.

Cal. Rep. Cit. 55, 51; 76, 342; 85, 307; 101, 176; 101, 178; 113, 287; 145, 151.

Prac. Act, sec. 158. En. April 29, 1851.

Costs on continuance: Post, sec. 1029.

§ 596. **In cases of adjournment a party may have the testimony of any witness taken.** The party obtaining a postponement of a trial in any court of record must, if required by the adverse party, consent that the testimony of any witness of such adverse party, who is in attendance, be then taken by deposition before a judge or clerk of the court in which the case is pending, or before such notary public as the court may indicate, which must accordingly be done; and the testimony so taken may be read on the trial, with the same effect, and subject to the same objections, as if the witnesses were produced. En. March 11, 1872.

Cal. Rep. Cit. 84, 225.

Depositions, in the state: Post, secs. 2019-2021, 2031-2038.

CHAPTER IV.

TRIAL BY JURY.

Article I. Formation of Jury, §§ 600-604.

II. Conduct of the Trial, §§ 607-610.

III. The Verdict, §§ 624-628.

ARTICLE I.

FORMATION OF THE JURY.

§ 600. Jury, how drawn.

§ 601. Challenges. Each party entitled to four peremptory challenges.

§ 602. Grounds of challenge.

§ 603. Challenges, how tried.

§ 604. Jury to be sworn.

§ 600. Jury, how drawn. When the action is called for trial by jury, the clerk must draw from the trial jury box of the court the ballots containing the names of the jurors, until the jury is completed or the ballots are exhausted. En. March 11, 1872.

Prac. Act, sec. 159. En. April 29, 1851.

Cal. Rep. Cit. 37, 678; 37, 679; 37, 689; 37, 690; 45, 330.

Jury, generally: Ante, secs. 190-254; trial jury: Ante, secs. 193, 194.

Trial by jury, conduct of: Post, secs. 607 et seq.; waiver of: Sec. 631; verdict after: Post, secs. 624 et seq.

Trial jury box: Ante, sec. 246.

Jurors, who are competent: Ante, secs. 198, 199.

Exceptions and excuses: Ante, secs. 200-202.

§ 601. Challenges. Each party entitled to four peremptory challenges. Either party may challenge the jurors, but where there are several parties on either side, they must join in a challenge before it can be made. The challenges are to individual jurors, and are either peremptory or for cause. Each party is entitled to four peremptory challenges. If no peremptory challenges are taken until the panel is full, they must be taken by the parties alternately, commencing with the plaintiff. En. March 11, 1872. Am'd. 1873-4, 310.

Cal. Rep. Cit. 78, 120; 78, 123; 110, 416; 138, 165.

Prac. Act, sec. 161. En. April 29, 1851.

Challenge for cause: Post, sec. 602.

§ 602. Grounds of challenge. Challenges for cause may be taken on one or more of the following grounds:

1. A want of any of the qualifications prescribed by this code to render a person competent as a juror.

2. Consanguinity or affinity within the fourth degree to any party.

3. Standing in the relation of guardian and ward, master and servant, employer and clerk, or principal and agent, to either party, or being a member of the family of either party, or a partner in business with either party, or surety on any bond or obligation for either party.

4. Having served as a juror or been a witness on a previous trial between the same parties, for the same cause of action.

5. Interest on the part of the juror in the event of the action, or in the main question involved in the action, except his interest as a member or citizen of a municipal corporation.

6. Having an unqualified opinion or belief as to the merits of the action, founded upon knowledge of its material facts, or of some of them.

7. The existence of a state of mind in the juror evincing enmity against or bias to or against either party. En. March 11, 1872. Am'd. 1873-4, 310.

Cal. Rep. Cit. 141, 742; 146, 422; 146, 425. Subd. 2—130, 107; 130, 108. Subd. 5—121, 107. Subd. 7—124, 314.

Prac. Act, sec. 162. En. April 29, 1851. Am'd. 1860, 302.

Cal. Rep. Cit. 12, 492.

Subd. 1. Want of necessary qualifications—Competent jurors: Ante, sec. 198. Incompetent jurors: Ante, sec. 199. Exemptions and excuses: Ante, secs. 200, 201.

Subd. 2. Consanguinity or affinity, generally: Ante, sec. 170.

Challenge in criminal causes: See Pen. Code, secs. 1055 et seq.

§ 603. Challenges, how tried. Challenges for cause must be tried by the court. The juror challenged and any other person may be examined as a witness on the trial of the challenge. En. March 11, 1872.

Prac. Act, sec. 163. En. April 29, 1851.

Cal. Rep. Cit. 29, 136.

§ 604. Jury to be sworn. As soon as the jury is completed, an oath must be administered to the jurors, in substance, that they and each of them will well and truly try the matter in issue between —, the plaintiff, and —, defendant, and a true verdict render, according to the evidence. En. March 11, 1872.

Prac. Act, sec. 160. En. April 29, 1851.

Cal. Rep. Cit. 37, 689; 37, 690; 45, 330; 144, 756.

Oath, administration of, generally: Post, secs. 2093-2097.

ARTICLE II.

CONDUCT OF THE TRIAL.

- § 607. Order of proceedings on trial.
- § 608. Charge to the jury. Court must furnish, in writing, upon request, the points of law contained therein.
- § 609. Special instructions.
- § 610. View by jury of the premises.
- § 611. Admonition when jury permitted to separate.
- § 612. Jury may take with them certain papers.
- § 613. Deliberation of jury, how conducted.
- § 614. May come into court for further instructions.
- § 615. Proceedings in case a juror becomes sick.
- § 616. When prevented from giving verdict, the cause may be again tried.
- § 617. While jury are absent, court may adjourn from time to time. Sealed verdict.
- § 618. Verdict, how declared. Form of. Polling the jury.
- § 619. Proceedings when verdict is informal.

§ 607. Order of proceedings on trial. When the jury has been sworn, the trial must proceed in the following order, unless the judge, for special reasons, otherwise directs:

1. The plaintiff, after stating the issue and his case, must produce the evidence on his part;

2. The defendant may then open his defense, and offer his evidence in support thereof;

3. The parties may then respectively offer rebutting evidence only, unless the court, for good reason, in furtherance of justice, permit them to offer evidence upon their original case;

4. When the evidence is concluded, unless the case is submitted to the jury on either side, or on both sides,

without argument, the plaintiff must commence and may conclude the argument;

5. If several defendants, having separate defenses, appear by different counsel, the court must determine their relative order in the evidence and argument.

6. The court may then charge the jury. En. March 11, 1872.

Cal. Rep. Cit. 67, 445; 140, 420; 140, 428; 140, 429; 140, 430; 140, 438.

Proceedings, etc., on trial—Amendments: Sec. 473. Either party may bring on trial: Ante, sec. 594. Nonsuits, etc.: Ante, sec. 581. As to the proof necessary to make out a case: Post, secs. 1867, 1869. Variance: Ante, secs. 469-471. View by jury: Post, sec. 610.

Evidence—Order of proof: Sec. 2042. Admissibility is for court: Post, sec. 2102. Allegations, material only need be proved: Sec. 1867. Burden of proof: Post, secs. 1869, 1981. Relevancy of evidence: Post, secs. 1868-1870. Relevancy, collateral facts: Post, secs. 1868, 1870.

Witnesses—Answer, witness must: Sec. 2065. Cross-examination: Post, sec. 2048. Direct examination: Post, sec. 2045. Excluding witnesses from courtroom: Post, sec. 2043. Experts: Post, sec. 1870, subd. 9. Impeaching and evidence of good character: Post, secs. 2049-2053. Interpreters: Post, sec. 1884. Leading questions: Post, sec. 2046. Mode of interrogation: Post, sec. 2044. Oaths: Post, secs. 2093-2097. Protection of witnesses: Post, sec. 2066. Refreshing memory: Post, sec. 2047. Testimony, clerk to take down, if no shorthand reporter: Post, sec. 1051. Writing shown to witness, other side may see: Post, sec. 2054.

Charge to jury: Post, secs. 608, 609.

§ 608. Charge to the jury. Court must furnish, in writing, upon request, the points of law contained therein. In charging the jury, the court may state to them all matters of law which it thinks necessary for their information in giving their verdict; and if it state the testimony of the case, it must inform the jury that they are the exclusive judges of all questions of fact. The court must furnish to either party, at the time, upon request, a statement, in writing, of the points of law contained in the charge, or sign at the time a statement of such points prepared and

submitted by the counsel of either party. En. March 11, 1872.

Cal. Rep. Cit. 124, 523.

Prac. Act, sec. 165. En. April 29, 1851.

Matters of law, court stating in charge: Const. Cal., art. 6, sec. 19; post, sec. 2102, also sec. 2061; sec. 657, subd. 7.

§ 609. **Special instructions.** Where either party asks special instructions to be given to the jury, the court must either give such instruction, as requested, or refuse to do so, or give the instruction with a modification, in such manner that it may distinctly appear what instructions were given in whole or in part. En. March 11, 1872.

Exceptions: Post, sec. 646.

§ 610. **View by jury of the premises.** When, in the opinion of the court, it is proper for the jury to have a view of the property which is the subject of litigation, or of the place in which any material fact occurred, it may order them to be conducted, in a body, under the charge of an officer, to the place, which shall be shown to them by some person appointed by the court for that purpose. While the jury are thus absent, no person, other than the person so appointed, shall speak to them on any subject connected with the trial. En. March 11, 1872.

Cal. Rep. Cit. 49, 609; 50, 557.

§ 611. **Admonition when jury permitted to separate.** If the jury are permitted to separate, either during the trial or after the case is submitted to them, they shall be admonished by the court that it is their duty not to converse with or suffer themselves to be addressed by any other person on any subject of the trial, and that it is their duty not to form or express an opinion thereon until the case is finally submitted to them. En. March 11, 1872.

Cal. Rep. Cit. 54, 547.

§ 612. **Jury may take with them certain papers.** Upon retiring for deliberation, the jury may take with them all papers which have been received as evidence in the cause, except depositions or copies of such papers as ought not,

in the opinion of the court, to be taken from the person having them in possession; and they may also take with them notes of the testimony or other proceedings on the trial, taken by themselves, or any of them, but none taken by any other person. En. March 11, 1872.

Cal. Rep. Cit. 76, 196; 83, 648; 88, 648; 146, 481.

Prac. Act, sec. 167. En. April 29, 1851.

Cal. Rep. Cit. 1, 177; 1, 179; 36, 179.

§ 613. Deliberation of jury, how conducted. When the case is finally submitted to the jury, they may decide in court or retire for deliberation; if they retire, they must be kept together, in some convenient place, under charge of an officer, until at least three-fourths of them agree upon a verdict or are discharged by the court. Unless by order of the court, the officer having them under his charge must not suffer any communication to be made to them, or make any himself, except to ask them if they or three-fourths of them are agreed upon a verdict, and he must not, before their verdict is rendered, communicate to any person the state of their deliberations, or the verdict agreed upon. En. March 11, 1872. Am'd. 1880, 10.

Prac. Act, sec. 166. En. April 29, 1851.

Three-fourths, agreement of: See Const. Cal., art. 1, sec. 7.

§ 614. May come into court for further instructions. After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed of any point of law arising in the cause, they may require the officer to conduct them into court. Upon their being brought into court, the information required must be given in the presence of, or after notice to, the parties or counsel. En. March 11, 1872.

Prac. Act, sec. 163. En. April 29, 1851.

Cal. Rep. Cit. 28, 169.

Holidays, Sundays, etc.—Instructions may be given to juries deliberating on: Ante, sec. 134, subd. 1. On non-judicial days: Idem.

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§ 615. Proceedings in case a juror becomes sick. If, after the impaneling of the jury, and before verdict, a juror becomes sick, so as to be unable to perform his duty, the court may order him to be discharged. In that case the trial may proceed with the other jurors, or another juror may be sworn and the trial begin anew; or the jury may be discharged and a new jury then or afterward impaneled. En. March 11, 1872.

Prac. Act, sec. 164. En. April 29, 1851.

Cal. Rep. Cit. 1, 337.

§ 616. When prevented from giving verdict, the cause may be again tried. In all cases where the jury are discharged, or prevented from giving a verdict, by reason of accident or other cause, during the progress of the trial, or after the cause is submitted to them, the action may be again tried immediately, or at a future time, as the court may direct. En. March 11, 1872.

Cal. Rep. Cit. 114, 478.

Prac. Act, sec. 169. En. April 29, 1851.

§ 617. While jury are absent, court may adjourn from time to time. Sealed verdict. While the jury are absent the court may adjourn from time to time, in respect to other business; but it is nevertheless open for every purpose connected with the cause submitted to the jury until a verdict is rendered or the jury discharged. The court may direct the jury to bring in a sealed verdict, at the opening of the court, in case of an agreement during a recess or adjournment for the day. En. March 11, 1872. Am'd. 1880, 10.

Cal. Rep. Cit. 50, 649.

Prac. Act, sec. 170. En. April 29, 1851.

§ 618. Verdict, how declared. Form of. Polling the jury. When the jury, or three-fourths of them, have agreed upon a verdict, they must be conducted into court, their names called by the clerk, and the verdict rendered by their foreman; the verdict must be in writing, signed by the foreman, and must be read by the clerk to the jury, and the inquiry made whether it is their verdict. " either party may require the jury to be polled, which is

done by the court or clerk asking each juror if it is his verdict; if upon such inquiry or polling, more than one-fourth of the jurors disagree thereto, the jury must be sent out again, but if no such disagreement be expressed, the verdict is complete and the jury discharged from the case. En. March 11, 1872. Am'd. 1880, 10.

Cal. Rep. Cit. 80, 82; 134, 11.

Prac. Act, sec. 171. En. April 29, 1851.

Prac. Act, sec. 173. En. April 29, 1851.

Cal. Rep. Cit. 8, 618.

Verdict received on nonjudicial day: Ante, sec. 134.

§ 619. Proceedings when verdict is informal. When the verdict is announced, if it is informal or insufficient in not covering the issue submitted, it may be corrected by the jury under the advice of the court, or the jury may be again sent out. En. March 11, 1872.

Cal. Rep. Cit. 66, 217.

Prac. Act, sec. 172. En. April 29, 1851.

ARTICLE III.

THE VERDICT.

§ 624. General and special verdicts defined.

§ 625. When a general or special verdict may be rendered.

§ 626. Verdict in actions for recovery of money or on establishing counterclaim.

§ 627. Verdict in actions for the recovery of specific personal property.

§ 628. Entry of verdict.

§ 624. General and special verdicts defined. The verdict of a jury is either general or special. A general verdict is that by which they pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant: a special verdict is that by which the jury find the facts only, leaving the judgment to the court. The special verdict must present the conclusions of fact as established by evidence, and not the evidence to prove them; and those conclusions of fact must be so presented, as that nothing shall remain to the court but to draw from them conclusions of law. En. March 11, 1872.

Code Civil Proc.—15.

Cal. Rep. Cit. 74, 208; 91, 210; 134, 11.

Prac. Act, sec. 174. En. April 29, 1851.

Cal. Rep. Cit. 19, 105.

General or special verdict, when may be rendered: Post, sec. 625.

Misconduct of jury: Sec. 657, subd. 2.

§ 625. When a general or special verdict may be rendered. In an action for the recovery of money only, or specific real property, the jury, unless instructed by the court to render a special verdict, may in their discretion render a general or special verdict. In all cases the court must, upon the request in writing of any of the parties, direct the jury to find a special verdict in writing upon all or any of the issues and in all cases must instruct them upon the request in writing of any of the parties, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and must direct a written finding thereon. The special verdict or finding must be filed with the clerk and entered upon the minutes. Where a special finding of facts is inconsistent with the general verdict, the former controls the latter and the court must give judgment accordingly. En. March 11, 1872. Am'd. 1905, 56.

Cal. Rep. Cit. 65, 51; 72, 381; 77, 590; 96, 648; 97, 418; 99, 124; 103, 471; 104, 641; 126, 365; 128, 208; 130, 652; 135, 612.

Prac. Act, sec. 175. En. April 29, 1851. Am'd. 1854, 62.

Cal. Rep. Cit. 4, 9; 19, 105; 28, 418; 28, 420.

§ 626. Verdict in actions for recovery of money or on establishing counterclaim. When a verdict is found for the plaintiff, in an action for the recovery of money, or for the defendant when a counterclaim for the recovery of money is established, exceeding the amount of the plaintiff's claim as established, the jury must also find the amount of the recovery. En. March 11, 1872.

Cal. Rep. Cit. 54, 280; 61, 120; 77, 427; 85, 193.

Prac. Act, sec. 176. En. April 29, 1851.

Cal. Rep. Cit. 19, 658; 36, 176; 41, 59.

§ 627. Verdict in actions for the recovery of specific personal property. In an action for the recovery of speci-

fic personal property, if the property has not been delivered to the plaintiff, or the defendant, by his answer, claim a return thereof, the jury, if their verdict be in favor of the plaintiff, or, if being in favor of the defendant, they also find that he is entitled to a return thereof, must find the value of the property, and, if so instructed, the value of specific portions thereof, and may, at the same time, assess the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the taking or detention of such property. En. March 11, 1872. Am'd. 1873-4, 311.

Cal. Rep. Cit. 54, 194; 56, 459; 56, 460; 65, 238; 87, 347; 89, 504; 90, 560; 101, 239; 108, 145; 126, 40.

Prac. Act, sec. 177. En. April 29, 1851.

Cal. Rep. Cit. 7, 571; 21, 280; 24, 149; 24, 151; 38, 584; 110, 277.

Jury must find, etc.: See post, sec. 667.

§ 628. **Entry of verdict.** Upon receiving a verdict, an entry must be made by the clerk in the minutes of the court, specifying the time of trial, the names of the jurors and witnesses, and setting out the verdict at length; and where special verdict is found, either the judgment rendered thereon, or if the case be reserved for argument or further consideration, the order thus reserving it. En. March 11, 1872.

Cal. Rep. Cit. 85, 579; 98, 363; 99, 515.

Prac. Act, sec. 178. En. April 29, 1851.

Cal. Rep. Cit. 28, 420.

CHAPTER V.

TRIAL BY THE COURT.

§ 631. When and how trial by jury may be waived.

§ 632. Upon trial by court, decision to be in writing and filed within twenty days.

§ 633. Facts found and conclusions of law must be separately stated. Judgment on.

§ 634. Findings may be waived, how.

§ 635. Findings, how prepared. (Repealed.)

§ 636. Proceedings after determination of issue of law.

§ 631. When and how trial by jury may be waived. Trial by jury may be waived by the several parties to an issue of fact in actions arising on contract, or for the re-

covery of specific real or personal property, with or without damages, and with the assent of the court in other actions, in manner following:

1. By failing to appear at the trial.
2. By written consent, in person or by attorney, filed with the clerk.

3. By oral consent, in open court, entered in the minutes. En. March 11, 1872. Am'd. 1873-4, 311.

Cal. Rep. Cit. 60, 366; 70, 448; 83, 231; 88, 183; 101, 641; 104, 467; 118, 248; 119, 248; 130, 642.

Prac. Act, sec. 179. En. April 29, 1851.

Cal. Rep. Cit. 4, 113; 16, 433; 18, 411; 18, 448.

Waiver of jury trial: See Const. Cal., art. 1, sec. 7.

§ 632. Upon trial by court, decision to be in writing and filed within thirty days. Upon the trial of a question of fact by the court, its decision must be given in writing and filed with the clerk within thirty days after the cause is submitted for decision. En. March 11, 1872. Am'd. 1873-4, 312.

Cal. Rep. Cit. 63, 37; 63, 55; 64, 56; 64, 92; 65, 117; 65, 259; 65, 530; 66, 412; 68, 603; 69, 218; 70, 551; 81, 341; 84, 532; 87, 571; 89, 487; 90, 327; 95, 348; 98, 206; 99, 347; 108, 481; 110, 75; 116, 599; 119, 383; 125, 204; 139, 259; 140, 675.

§ 633. Facts found and conclusions of law must be separately stated. Judgment on. In giving the decision, the facts found and the conclusions of law must be separately stated. Judgment upon the decision must be entered accordingly. En. March 11, 1872.

Cal. Rep. Cit. 49, 555; 61, 334; 63, 37; 63, 55; 64, 56; 65, 117; 65, 530; 66, 318; 66, 406; 66, 412; 68, 159; 68, 454; 69, 218; 70, 551; 81, 341; 84, 532; 89, 487; 90, 327; 91, 598; 95, 348; 98, 206; 98, 362; 99, 347; 102, 623; 106, 539; 107, 426; 108, 455; 108, 481; 108, 482; 110, 75; 110, 76; 116, 599; 119, 383; 125, 204; 138, 330; 140, 481; 140, 675.

Prac. Act, sec. 180. En. April 29, 1851. Am'd. 1865-6, 844.

Cal. Rep. Cit. 2, 305; 7, 261; 8, 619; 18, 448; 28, 70; 28, 305; 31, 98; 33, 255; 33, 330; 34, 134; 34, 226; 35, 87; 38, 530; 39, 337; 46, 372; 89, 488; 105, 693.

§ 634. Findings may be waived, how. Findings of fact may be waived by the several parties to an issue of fact:

1. By failing to appear at the trial;
 2. By consent in writing, filed with the clerk;
 3. By oral consent in open court, entered in the minutes.
- En. March 11, 1872.

Cal. Rep. Cit. 51, 263; 63, 37; 67, 54; 68, 240; 83, 233; 85, 153; 91, 587; 91, 598; 94, 56; 96, 41; 99, 515; 104, 247; 110, 32; 146, 213.

§ 635. Findings, how prepared. (Repealed.) En-March 11, 1872. Am'd. 1873-4, 312. Rep. 1875-6, 91.
Cal. Rep. Cit. 57, 537.

§ 636. Proceedings after determination of issue of law. On a judgment for the plaintiff upon an issue of law, he may proceed in the manner prescribed by the first two subdivisions of section five hundred and eighty-five, upon the failure of the defendant to answer. If judgment be for the defendant upon an issue of law, and the taking of an account or the proof of any fact be necessary to enable the court to complete the judgment, a reference may be ordered as in that section provided. En. March 11, 1872.

Cal. Rep. Cit. 103, 207.

Prac. Act, sec. 181. En. April 29, 1851.

Issue of law: Ante, sec. 589; when a bar: Post, sec. 1908.

Reference: Post, secs. 638 et seq.

Leave to answer, after defendant's demurrer overruled: Ante, sec. 472.

Default, judgment by: Ante, sec. 585.

Judgment generally: Post, sec. 664.

CHAPTER VI.

OF REFERENCES AND TRIALS BY REFEREES.

- § 638. Reference ordered upon agreement of parties, in what cases.
- § 639. Reference ordered on motion, in what cases.
- § 640. Number of referees, qualifications, etc.
- § 641. Either party may object. Grounds of objection.
- § 642. Objections, how disposed of.
- § 643. Referees to report within twenty days.
- § 644. Effect of referee's finding.
- § 645. How excepted to, etc.

§ 638. Reference ordered upon agreement of parties, in what cases. A reference may be ordered upon the agreement of the parties filed with the clerk or entered in the minutes:

1. To try any or all of the issues in an action or proceeding, whether of fact or of law, and to report a finding and judgment thereon;

2. To ascertain a fact necessary to enable the court to determine an action or proceeding. En. March 11, 1872.

Cal. Rep. Cit. 68, 534; 89, 520; 99, 515; 103, 20; 123, 41; 123, 99; 123, 101. Subd. 1—136, 78.

Prac. Act, sec. 182. En. April 29, 1851. Am'd. 1865-6, 844.

Cal. Rep. Cit. 2, 94; 20, 93; 24, 426; 26, 267; 35, 552; 46, 146; 46, 149; 46, 150.

Reference in general; court commissioners: Ante, sec. 259, subd. 2; fees for: Post, sec. 1028; private trial: Sec. 125; compulsory; See next section.

Referees, number, etc.: Post, sec. 640; objections to: Post, secs. 641, 642; report of: Post, secs. 643-45.

Trial by referee: Post, sec. 1053.

§ 639. Reference ordered on motion, in what cases. When the parties do not consent, the court may, upon the application of either, or of its own motion, direct a reference in the following cases:

1. When the trial of an issue of fact requires the examination of a long account on either side; in which case the referees may be directed to hear and decide the whole issue, or report upon any specific question of fact involved therein;

2. When the taking of an account is necessary for the information of the court before judgment, or for carrying a judgment or order into effect;

3. When a question of fact, other than upon the pleadings, arises upon motion or otherwise, in any stage of the action;

4. When it is necessary for the information of the court in a special proceeding. En. March 11, 1872.

Cal. Rep. Cit. 57, 643; 79, 702; 99, 423; 103, 20; 109, 255; 122, 156; 123, 41; 125, 50.

Prac. Act, sec. 183. En. April 29, 1851.

Cal. Rep. Cit. 24, 425; 24, 426; 41, 405.

Reference on proceedings supplementary to execution: Sec. 714, post.

§ 640. Number of referees, qualifications, etc. A reference may be ordered to any person or persons, not exceed-

ing three, agreed upon by the parties. If the parties do not agree, the court or judge must appoint one or more referees, not exceeding three, who reside in the county in which the action or proceeding is triable, and against whom there is no legal objection, or the reference may be made to a court commissioner of the county where the cause is pending. En. March 11, 1872.

Prac. Act, sec. 184. En. April 29, 1851. Am'd. 1865-6, 845.

Cal. Rep. Cit. 70, 301.

Reference ordered: Ante, secs. 638, 639.

Three referees, two may act: Post, sec. 1053.

Court commissioner: Ante, sec. 259, subd. 2.

§ 641. Either party may object. Grounds of objection. Either party may object to the appointment of any person as referee, on one or more of the following grounds:

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1. A want of any of the qualifications prescribed by statute to render a person competent as a juror;

2. Consanguinity, or affinity, within the third degree, to either party, or to any judge of the court, in which the appointment shall be made;

3. Standing in the relation of guardian and ward, master and servant, employer and clerk, or principal and agent, to either party; or, being a member of the family of either party; or a partner in business with either party; or being security on any bond or obligation for either party;

4. Having served as a juror or been a witness on any trial between the same parties for the same cause of action;

5. Interest on the part of such person in the event of the action, or in the main question involved in the action;

6. Having formed or expressed an unqualified opinion or belief as to the merits of the action;

7. The existence of a state of mind in such person evincing enmity against or bias to either party. En. March 11, 1872. Am'd. 1897, 60.

Prac. Act, sec. 185. En. April 29, 1851.

§ 642. Objections, how disposed of. The objections taken to the appointment of any person as referee must be heard and disposed of by the court. Affidavits may be

read and witnesses examined as to such objections. En. March 11, 1872.

Cal. Rep. Cit. 104, 247.

Prac. Act, sec. 186. En. April 29, 1851.

Objections: Ante, see sec. 641.

§ 643. **Referees to report within twenty days.** The referees or commissioner must report their findings in writing to the court, within twenty days after the testimony is closed, and the facts found and conclusions of law must be separately stated therein. En. March 11, 1872.

Prac. Act, sec. 187. En. April 29, 1851. Am'd. 1865-6, 845.

Cal. Rep. Cit. 22, 473; 34, 35; 41, 405; 82, 482; 103, 21.

Court commissioner as referee: Ante, sec. 259, subd. 2.

Referees, where three, all must meet, but two can act: Post, sec. 1053.

Enforcing order: Ante, sec. 128, subd. 2.

Findings, effect of: Post, sec. 645.

§ 644. **Effect of referee's finding.** The finding of the referee or commissioner upon the whole issue must stand as the finding of the court, and upon filing of the finding with the clerk of the court, judgment may be entered thereon in the same manner as if the action had been tried by the court. En. March 11, 1872.

Cal. Rep. Cit. 103, 20.

§ 645. **How excepted to, etc.** The findings of the referee or commissioner may be excepted to and reviewed in like manner as if made by the court. When the reference is to report the facts, the findings reported has the effect of a special verdict. En. March 11, 1872.

Cal. Rep. Cit. 104, 247.

Exceptions, generally: Post, secs. 646 et seq.; new trials: Post, secs. 656 et seq.; court commissioner's report, time and mode of excepting to: Ante, sec. 259, subd. 2.

CHAPTER VII.

PROVISIONS RELATING TO TRIALS IN GENERAL.

Article I. Exceptions, §§ 646-653.

II. New Trials, §§ 656-653½.

ARTICLE I.

EXCEPTIONS.

§ 646. Exceptions may be taken. Time when taken, etc.

§ 647. What deemed excepted to.

§ 648. Exception, form of.

§ 649. Exceptions signed by judge and filed with clerk.

§ 650. Exceptions not presented at time of ruling. Notice to adverse party, how settled upon, etc.

§ 651. Exceptions after judgment, etc.

§ 652. When exception is refused, application to supreme court to prove the same, etc.

§ 653. Proceedings where judge ceases to hold office.

§ 646. Exceptions may be taken. Time when taken, etc. An exception is an objection upon a matter of law to a decision made, either before or after judgment, by a court, tribunal, judge, or other judicial officer, in an action or proceeding. The exception must be taken at the time the decision is made, except as provided in sec. 647. En. March 11, 1872. Am'd. 1873-4, 312; 1875-6, 91.

Cal. Rep. Cit. 45, 222; 51, 111; 57, 239; 58, 175; 61, 163; 63, 304; 70, 581; 79, 408; 87, 391; 80, 476; 81, 609; 81, 639; 83, 233; 87, 391; 90, 258; 108, 141; 122, 476.

Prac. Act, sec. 188. En. April 29, 1851.

Cal. Rep. Cit. 12, 493; 20, 93; 28, 174; 28, 263; 32, 317; 32, 322; 33, 553; 34, 686; 35, 257; 41, 317.

Matters deemed excepted to: Post, sec. 647.

Amendments to: Post, sec. 650.

§ 647. What deemed excepted to. The verdict of the jury, the final decision in an action or proceeding, an interlocutory order or decision, finally determining the rights of the parties, or some of them, an order or decision from which an appeal may be taken, an order sustaining or overruling a demurrer, allowing or refusing to allow an amendment to a pleading, striking out a pleading or a portion thereof, refusing a continuance, an order made upon ex parte application, and an order or decision made

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in the absence of a party, are deemed to have been excepted to. En. March 11, 1872. Am'd. 1875-6, 92.

Cal. Rep. Cit. 47, 166; 57, 243; 60, 252; 63, 304; 63, 509; 71, 309; 77, 648; 82, 607; 83, 232; 86, 212; 90, 61; 98, 283; 98, 417; 109, 120; 109, 121; 112, 571; 122, 476; 123, 79; 123, 80; 135, 480; 142, 682; 145, 569; 146, 552.

Prac. Act, sec. 191. En. April 29, 2351.

Cal. Rep. Cit. 2, 325; 34, 686.

§ 648. **Exception, form of.** No particular form of exception is required, but when the exception is to the verdict or decision, upon the ground of the insufficiency of the evidence to justify it, the objection must specify the particulars in which such evidence is alleged to be insufficient. The objection must be stated with so much of the evidence or other matter as is necessary to explain it, and no more. Only the substance of the reporter's notes of the evidence shall be stated. Documents on file in the action or proceeding may be copied, or the substance thereof stated, or a reference thereto, sufficient to identify them, may be made. En. March 11, 1872. Am'd. 1875-6, 92.

Cal. Rep. Cit. 46, 534; 49, 45; 49, 555; 49, 556; 50, 503; 54, 130; 57, 239; 61, 608; 67, 304; 68, 591; 84, 531; 84, 532; 89, 24; 89, 140; 90, 62; 90, 259; 92, 239; 99, 226; 104, 211; 108, 455; 112, 607; 117, 184; 122, 407; 130, 418; 132, 614; 144, 540; 146, 608.

Prac. Act, sec. 190. En. April 29, 1851.

Cal. Rep. Cit. 28, 263; 33, 553.

§ 649. **Exceptions signed by judge and filed with clerk.** A bill containing the exception to any decision may be presented to the court or judge for settlement, at the time the decision is made, and after having been settled, shall be signed by the judge and filed with the clerk. When the decision excepted to is made by a tribunal other than a court, or by a judicial officer, the bill of exceptions shall be presented to, and settled and signed by such tribunal or officer. En. March 11, 1872; 1875-6, 92.

Cal. Rep. Cit. 47, 641; 50, 445; 54, 417; 57, 503; 57, 504; 57, 505; 66, 408; 80, 476; 81, 610; 83, 160; 83, 161; 83, 162; 83, 163; 96, 486; 98, 136; 115, 399; 120, 38; 122, 2; 122, 68; 122, 69; 127, 584; 128, 138; 128, 579; 128, 580; 138, 604; 138, 605; 141, 152; 142, 134.

Prac. Act, sec. 189. En. April 29, 1851. Am'd. 1863, 360.

Cal. Rep. Cit. 28, 174; 28, 263; 32, 317; 32, 322; 33, 553;
35, 257; 49, 266; 70, 301.

§ 650. Exceptions not presented at time of ruling. Notice to adverse party, how settled upon, etc. When a party desires to have exceptions taken at a trial settled in a bill of exceptions, he may, within ten days after the entry of judgment, if the action were tried with a jury, or after receiving notice of the entry of judgment, if the action were tried without a jury, or such further time as the court in which the action is pending, or a judge thereof, may allow, prepare the draft of a bill, and serve the same, or a copy thereof, upon the adverse party. Such draft must contain all the exceptions taken upon which the party relies. Within ten days after such service the adverse party may propose amendments thereto, and serve the same, or a copy thereof, upon the other party. The proposed bill and amendments must, within ten days thereafter, be presented by the party seeking the settlement of the bill, to the judge who tried or heard the case, upon five days' notice to the adverse party, or be delivered to the clerk of the court for the judge. When received by the clerk he must immediately deliver them to the judge, if he be in the county; if he be absent from the county, and either party desire the papers to be forwarded to the judge, the clerk must, upon notice in writing of such party, immediately forward them by mail, or other safe channel; if not thus forwarded, the clerk must deliver them to the judge immediately after his return to the county. When received from the clerk, the judge must designate the time at which he will settle the bill, and the clerk must immediately notify the parties of such designation. At the time designated, the judge must settle the bill. If the action was tried before a referee, the proposed bill, with the amendments, if any, must be presented to such referee for settlement within ten days after service of the amendments, upon notice of five days to the adverse party, and thereupon the referee shall settle the bill. If no amendments are served, or if served are allowed, the proposed bill may be presented, with the amendments, if any, to the judge or referee, for settlement, without notice to the adverse party. It is the duty of the judge or referee, in settling the bill, to strike out of it all redundant and useless matter so that the exceptions may be presented as briefly as possible. When settled, the bill must be signed by the judge or referee, with his certificate to the

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effect that the same is allowed, and shall then be filed with the clerk. En. March 11, 1872. Am'd. 1873-4, 313.

Cal. Rep. Cit. 47, 641; 47, 642; 49, 511; 56, 469; 57, 504; 57, 505; 61, 255; 63, 419; 64, 541; 65, 236; 66, 409; 66, 410; 66, 411; 76, 356; 76, 595; 76, 596; 80, 476; 81, 610; 83, 160; 83, 161; 83, 162; 83, 163; 84, 539; 84, 549; 88, 151; 89, 40; 90, 62; 90, 258; 94, 201; 93, 621; 93, 623; 98, 106; 98, 109; 98, 136; 98, 137; 99, 651; 101, 176; 101, 177; 101, 653; 102, 441; 105, 86; 106, 145; 106, 497; 112, 295; 113, 375; 115, 35; 115, 399; 115, 635; 118, 523; 119, 351; 122, 2; 122, 69; 124, 425; 126, 678; 127, 584; 128, 46; 128, 138; 128, 354; 128, 356; 128, 580; 129, 281; 129, 282; 129, 555; 130, 625; 131, 409; 135, 669; 138, 604; 138, 605; 138, 606; 141, 152; 142, 134; 142, 297; 143, 15; 143, 17; 143, 18; 144, 540; 147, 377.

Further time: Ante, sec. 473; post, sec. 1054.

New trial, bill of exceptions: Post, sec. 659, subd. 2.

Requisites of bill of exceptions: Ante, sec. 648.

Bill of exception in criminal causes: See Pen. Code, secs. 1171 et seq.

§ 651. Exceptions after judgment, etc. Exceptions to any decision made after judgment may be presented to the judge at the time of such decision, and be settled or noted, as provided in sec. 649, and a bill thereof may be presented and settled afterward, as provided in sec. 650, and within like periods after entry of the order, upon appeal from which said decision is reviewable. En. March 11, 1872. Am'd. 1873-4, 314.

Cal. Rep. Cit. 54, 417; 57, 505; 63, 304; 80, 476; 81, 610; 98, 136; 98, 137; 119, 383; 120, 237; 122, 69; 144, 279; 146, 682.

§ 652. When exception is refused, application to supreme court to prove the same, etc. If the judge in any case refuse to allow an exception in accordance with the facts, the party desiring the bill settled may apply by petition to the supreme court to prove the same. The application may be made in the mode and manner, and under such regulations as that court may prescribe; and the bill, when proven, must be certified by the chief justice as correct, and filed with the clerk of the court in which the action was tried, and when so filed it has the same force and effect as if settled by the judge who tried the cause. En. March 11, 1872.

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Cal. Rep. Cit. 49, 510; 68, 414; 72, 229; 73, 2; 82, 481; 82, 482; 83, 44; 84, 232; 87, 391; 87, 392; 87, 393; 89, 591; 90, 258; 90, 260; 92, 653; 97, 258; 102, 441; 109, 291; 129, 145; 131, 409; 147, 360; 147, 362; 147, 570.

§ 653. Proceedings where judge ceases to hold office. When the decision excepted to was made by any judicial officer other than a judge, the bill of exceptions shall be presented to such judicial officer and be settled and signed by him, in the same manner as it is required to be presented to, settled, and signed by a court or judge. A judge or judicial officer may settle and sign a bill of exceptions after as well as before he ceases to be such judge or judicial officer. If such judge or judicial officer, before the bill of exceptions is settled, dies, is removed from office, becomes disqualified, is absent from the state, or refuses to settle the bill of exceptions, or if no mode is provided by law for the settlement of the same, it shall be settled and certified in such manner as the supreme court may by its order or rules direct. Judges, judicial officers, and the supreme court shall respectively possess the same power, in settling and certifying statements, as is by this section conferred upon them in settling and certifying bills of exceptions. En. March 11, 1872. Am'd. 1875-6, 93.

Cal. Rep. Cit. 66, 405; 66, 407; 66, 408; 66, 413; 67, 331; 81, 639; 91, 485; 118, 523; 142, 215.

ARTICLE II.

NEW TRIALS.

- § 656. New trial defined.
- § 657. When a new trial may be granted.
- § 658. On what papers moved for.
- § 659. Notice of motion, upon whom served, and what to contain.
- § 660. Motion to be heard at the time specified, or dismissed.
- § 661. Record on appeal.
- § 662. New trial on court's own motion.
- § 663. Vacation of judgment.
- § 663½. Notice of motion.

§ 656. New trial defined. A new trial is a re-examination of an issue of fact in the same court after a trial and decision by a jury or court, or by referees. En. March 11, 1872. § 656
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Cal. Rep. Cit. 49, 44; 49, 45; 56, 17; 56, 498; 61, 608; 62, 560; 65, 259; 67, 486; 68, 376; 71, 309; 73, 566; 73, 570; 77, 307; 78, 65; 79, 703; 80, 414; 88, 315; 90, 327; 93, 619; 99, 270; 102, 52; 102, 587; 120, 37; 125, 16; 128, 334; 138, 559; 140, 169; 141, 167.

Prac. Act, sec. 192. En. April 29, 1851.

Cal. Rep. Cit. 25, 402; 25, 473; 25, 474; 25, 476; 25, 477; 25, 488; 25, 490; 27, 110; 27, 238; 28, 339; 39, 489; 40, 545; 45, 121.

§ 657. When a new trial may be granted. The former verdict or other decision may be vacated and a new trial granted, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party:

1. Irregularity in the proceedings of the court, jury, or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial;

2. Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors;

3. Accident or surprise, which ordinary prudence could not have guarded against;

4. Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial;

5. Excessive damages appearing to have been given under the influence of passion or prejudice;

6. Insufficiency of the evidence to justify the verdict or other decision, or that it is against law;

7. Error in law, occurring at the trial and excepted to by the party making the application. En. March 11, 1872.

Cal. Rep. Cit. 58, 175; 61, 608; 62, 560; 65, 550; 66, 521; 68, 376; 71, 558; 74, 270; 79, 703; 83, 228; 88, 49; 90, 327; 93, 619; 102, 260; 108, 52; 108, 286; 123, 521; 124, 41; 134, 206; 136, 484; 141, 356; 143, 27; 146, 63; 146, 682. Subd. 1—54, 201; 60, 252; 64, 600; 130, 205; 141, 251; 145, 146; 145, 148; 145, 149; 145, 150; 145, 154. Subd. 2—73, 607; 77, 590; 98, 385; 101, 512; 105, 635; 120, 479; 125, 504; 132, 308; 134, 497; 134, 498. Subd. 3—62, 348; 71, 309; 83, 229; 91, 322; 106, 601. Subd. 4—90, 518; 101, 120; 129, 691. Subd. 5—110, 286; 125, 144; 139, 589; 141, 69. Subd. 6—49, 44; 56, 17; 56, 495; 65, 259; 67, 487; 77, 590; 90, 518; 118, 383; 120, 545; 139, 589; 140, 169. Subd. 7—77, 590; 86, 82; 90, 518.

Prac. Act, sec. 193. En. April 29, 1851. Am'd. 1862, 38.

Cal. Rep. Cit. 127, 48.

Prac. Act, sec. 622. En. April 29, 1851.

Cal. Rep. Cit. 127, 48.

How the application is to be made: Post, sec. 651.

Discretion—Court may grant a new trial of its own motion: Post, sec. 662.

Verdict against law: See sec. 662, post.

§ 658. On what papers moved for. When the application is made for a cause mentioned in the first, second, third, and fourth subdivisions of the last section, it must be made upon affidavits; for any other cause it may be made at the option of the moving party, either upon the minutes of the court, or a bill of exceptions, or a statement of the case, prepared as hereinafter provided. En. March 11, 1872. Am'd. 1873-4, 314.

Cal. Rep. Cit. 47, 59; 61, 163; 61, 295; 64, 600; 86, 82; 90, 263; 104, 287; 113, 512; 114, 450; 118, 636; 120, 237; 125, 503; 128, 47; 128, 138; 130, 205; 141, 251; 143, 27; 145, 146; 146, 682.

Mode of application—Affidavits, on: Post, sec. 659, subd. 1; minutes of court, on: Post, sec. 659, subd. 4; bill of exceptions, on: Post, sec. 659, subd. 2; statement of case, on: Post, sec. 659, subd. 3.

§ 659. Notice of motion, upon whom served, and what to contain. The party intending to move for a new trial must, within ten days after the verdict of the jury, if the action were tried by a jury, or after notice of the decision of the court or referee, if the action were tried without a jury; file with the clerk and serve upon the adverse party a notice of his intention, designating the grounds upon which the motion will be made, and whether the same will be made upon affidavits or the minutes of the court, or a bill of exceptions, or a statement of the case:

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1. If the motion is to be made upon affidavits, the moving party must, within ten days after serving the notice, or such further time as the court in which the action is pending, or a judge thereof, may allow, file such affidavits with the clerk, and serve a copy upon the adverse party, who shall have ten days to file counter-affidavits, a copy of which must be served upon the moving party.

2. If the motion is to be made upon a bill of exceptions, and no bill has already been settled as hereinbefore pro-

vided, the moving party shall have the same time after service of the notice to prepare and obtain a settlement of a bill of exceptions as is provided after the entry of judgment, or after receiving notice of such entry by section 650, and the bill shall be prepared and settled in a similar manner. If a bill of exceptions has been already settled and filed, when the notice of motion is given, such bill shall be used on the motion.

3. If the motion is to be made upon a statement of the case, the moving party must, within ten days after service of the notice, or such further time as the court in which the action is pending, or the judge thereof, may allow, prepare a draft of the statement, and serve the same, or a copy thereof, upon the adverse party. If such proposed statement be not agreed to by the adverse party, he must, within ten days thereafter, prepare amendments thereto, and serve the same, or a copy thereof, upon the moving party. If the amendments be adopted, the statement shall be amended accordingly, and then presented to the judge who tried or heard the cause, for settlement, or be delivered to the clerk of the court for the judge. If not adopted, the proposed statement and amendments shall, within ten days thereafter, be presented by the moving party to the judge, upon five days' notice to the adverse party, or delivered to the clerk of the court for the judge; and thereupon the same proceedings for the settlement of the statement shall be taken by the parties, and clerk, and judge, as are required for the settlement of bills of exception by section 650. If the action was heard by a referee, the same proceedings shall be had for the settlement of the statement by him as are required by that section for the settlement of bills of exception by a referee. If no amendments are served within the time designated, or, if served, are allowed, the proposed statement and amendments, if any, may be presented to the judge or referee, for settlement, without notice to the adverse party. When the notice of the motion designates, as the ground of the motion, the insufficiency of the evidence to justify the verdict or other decision, the statement shall specify the particulars in which such evidence is alleged to be insufficient. When the notice designates, as the ground of the motion, errors in law occurring at the trial, and excepted to by the moving party, the statement shall specify the particular errors upon which the party will rely. If no such specifications be made, the statement shall be disregarded on the hearing of the motion. It is the duty of the

judge or referee, in settling the statement, to strike out of it all redundant and useless matter, and to make the statement truly represent the case, notwithstanding the assent of the parties to such redundant or useless matter, or to any inaccurate statement. When settled, the statement shall be signed by the judge or referee, with his certificate to the effect that the same is allowed, and shall then be filed with the clerk.

4. When the motion is to be made upon the minutes of the court, and the ground of the motion is the insufficiency of the evidence to justify the verdict or other decision the notice of motion must specify the particulars in which the evidence is alleged to be insufficient; and, if the ground of the motion be errors in law occurring at the trial, and excepted to by the moving party, the notice must specify the particular errors upon which the party will rely. If the notice do not contain the specifications here indicated, when the motion is made on the minutes of the court, the motion must be denied. En. March 11, 1872. Am'd. 1873-4, 315.

Cal. Rep. Cit. 49, 555; 54, 182; 54, 546; 56, 610; 57, 231; 57, 632; 58, 82; 59, 100; 61, 295; 63, 245; 65, 236; 66, 470; 66, 471; 66, 472; 67, 590; 67, 602; 68, 23; 68, 487; 71, 558; 71, 559; 71, 563; 76, 596; 77, 526; 78, 108; 80, 414; 83, 161; 86, 82; 89, 40; 90, 264; 93, 201; 95, 249; 95, 250; 97, 16; 97, 515; 98, 316; 99, 175; 99, 178; 100, 577; 112, 7; 112, 590; 115, 26; 116, 45; 116, 138; 117, 331; 119, 187; 119, 351; 120, 545; 125, 52; 125, 116; 126, 678; 128, 47; 128, 138; 128, 139; 129, 357; 129, 358; 129, 360; 130, 192; 131, 574; 132, 614; 135, 119; 138, 605; 138, 642; 139, 15; 143, 27. Subd. 1—129, 691; 141, 41. Subd. 2—199, 281; 141, 153. Subd. 3—54, 130; 54, 596; 55, 279; 60, 432; 61, 608; 63, 418; 65, 260; 66, 318; 66, 405; 66, 409; 66, 410; 66, 521; 67, 258; 68, 73; 68, 376; 68, 641; 69, 116; 69, 644; 70, 538; 73, 476; 74, 532; 75, 352; 76, 9; 76, 10; 76, 105; 76, 595; 76, 596; 79, 683; 82, 55; 83, 320; 84, 300; 85, 165; 89, 612; 90, 71; 92, 657; 93, 209; 95, 445; 97, 462; 101, 430; 105, 412; 106, 145; 110, 213; 112, 7; 119, 186; 120, 566; 121, 146; 121, 415; 122, 577; 124, 410; 125, 271; 126, 678; 128, 308; 128, 525; 131, 409; 133, 502; 134, 484; 136, 512; 138, 642; 139, 652; 140, 327; 141, 68; 141, 153; 141, 621; 141, 740; 144, 540. Subd. 4—69, 204; 74, 59; 83, 162; 86, 645; 94, 422; 103, 504; 113, 511; 114, 71; 126, 52; 134, 484; 138, 605.

Prac. Act, sec. 623. En. April 29, 1851.

Code Civil Proc.—16.

Bill of exceptions, settling: Ante, sec. 650.

Extension of time: Post, sec. 1054.

Time to except to court commissioner's report on matters other than issues of fact raised by pleadings: Ante, sec. 259.

Minutes of court, motion on, statement: Post, sec. 661.

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§ 660. Motion to be heard at the time specified, or dismissed. The application for a new trial shall be heard at the earliest practicable period after notice of the motion, if the motion is to be heard upon the minutes of the court, and in other cases, after the affidavits, bill of exceptions, or statement, as the case may be, are filed, and may be brought to a hearing upon motion of either party. On such hearing reference may be had in all cases to the pleadings and orders of the court on file, and when the motion is made on the minutes, reference may also be had to any depositions, documentary evidence, and phonographic report of the testimony on file. En. March 11, 1872. Am'd. 1873-4, 317.

Cal. Rep. Cit. 65, 260; 79, 683; 82, 55; 90, 264; 90, 265; 102, 586; 105, 83; 114, 71; 127, 357; 127, 360; 128, 47; 128, 325; 131, 409; 137, 45; 143, 27.

Chambers, motions for new trials may be heard at: Ante, sec. 166.

§ 661. Record on appeal. The judgment roll and the affidavits, or bill of exceptions, or statement, as the case may be, used on the hearing, with a copy of the order made, shall constitute the record to be used on appeal from the order granting or refusing a new trial, unless the motion be made on the minutes of the court, and in that case the judgment roll and a statement to be subsequently prepared, with a copy of the order, shall constitute the record on appeal. Such subsequent statement shall be proposed by the party appealing, or intending to appeal, within ten days after the entry of the order, or such further time as the court in which the action is pending, or a judge thereof, may allow, and the same or a copy thereof be served upon the adverse party, who shall have ten days thereafter to prepare amendments thereto and serve the same or a copy thereof, upon the party appealing, or intending to appeal; and thereafter proceedings shall be had, and within like periods, for the settlement of the statement as provided by section 659, but the statement shall only contain the grounds argued before the court for a new trial, and so much of the evidence or other

matter as may be necessary to explain them; and it shall be the duty of the judge to exclude all other evidence or matter from the statement. En. March 11, 1872. Am'd. 1873-4, 318.

Cal. Rep. Cit. 55, 44; 57, 293; 64, 594; 66, 405; 66, 407; 66, 409; 66, 410; 66, 411; 66, 414; 68, 23; 69, 73; 78, 385; 79, 683; 81, 639; 86, 645; 90, 264; 92, 64; 96, 114; 105, 86; 110, 560; 110, 561; 114, 71; 114, 72; 120, 236; 122, 576; 128, 47; 128, 138; 134, 484; 138, 604; 141, 152; 144, 280; 146, 11; 147, 437.

Prac. Act, sec. 194. En. April 29, 1851.

Cal. Rep. Cit. 32, 317; 33, 554; 36, 122.

Prac. Act, sec. 195. En. April 29, 1851. Am'd. 1861, 590; 1863, 643; 1864, 246; 1865-6, 845.

Cal. Rep. Cit. 2, 307; 3, 89; 9, 68; 9, 77; 9, 247; 22, 658; 24, 181; 24, 355; 24, 356; 25, 488; 25, 489; 26, 284; 27, 110; 27, 112; 27, 113; 27, 114; 27, 320; 27, 338; 27, 339; 27, 410; 28, 261; 28, 303; 28, 311; 28, 312; 28, 413; 28, 418; 32, 172; 32, 317; 32, 318; 32, 319; 32, 320; 33, 210; 33, 472; 34, 91; 34, 239; 34, 626; 35, 257; 36, 120; 36, 122; 37, 338; 38, 202; 38, 280; 39, 33; 39, 34; 39, 253; 41, 251; 41, 404; 41, 407; 41, 518; 41, 621; 43, 322; 43, 542; 43, 576; 44, 211; 44, 212; 45, 121; 46, 4; 46, 42; 47, 164; 47, 427; 49, 341; 141, 192.

Prac. Act, sec. 196. En. April 29, 1851. Am'd. 1863, 361.

Cal. Rep. Cit. 27, 339.

Judgment roll: Post, sec. 670.

Affidavits, bill of exceptions, statement: Ante, sec. 659, subds. 1, 2, 3.

Minutes of court: Ante, sec. 660.

§ 662. New trial on court's own motion. The verdict of a jury may also be vacated, and a new trial granted by the court in which the action is pending, on its own motion, without the application of either of the parties, when there has been such a plain disregard by the jury of the instructions of the court, or the evidence in the case, as to satisfy the court that the verdict was rendered under a misapprehension of such instructions, or under the influence of passion or prejudice. The order of the court may be reviewed on appeal in the same manner as orders made on motions for a new trial, and a statement to be

used on such appeal may be prepared in the same manner as statements after a motion is heard upon the minutes of the court, as provided in section 661. En. Stats. 1873-4, 319.

Cal. Rep. Cit. 64, 594; 74, 59; 91, 212; 103, 505; 118, 383; 123, 521; 128, 343; 128, 344; 134, 491; 136, 484; 143, 26; 143, 27; 143, 30.

§ 663. Vacation of judgment. A judgment or decree of a superior court, when based upon findings of fact made by the court, or the special verdict of a jury, may, upon motion of the party aggrieved, be set aside and vacated by the same court, and another and different judgment entered, for either of the following causes, materially affecting the substantial rights of such party and entitling him to a different judgment:

1. Incorrect or erroneous conclusions of law not consistent with or not supported by the findings of fact; and in such case when the judgment is set aside the conclusions of law shall be amended and corrected.

2. A judgment or decree not consistent with or not supported by the special verdict. En. Stats. 1873-4, 319. Am'd. 1877-8, 100. Rep. 1880, 64. En. 1897, 58.

Cal. Rep. Cit. 105, 111; 121, 579; 125, 241; 126, 108; 131, 325; 140, 169; 141, 165; 141, 166; 141, 67; 142, 468; 145, 456; 146, 51.

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§ 663½. Notice of motion. The party intending to make the motion mentioned in the last section must, within ten days after notice of the rendition of judgment or decree, serve upon the adverse party and file with the clerk of the court a notice of his intention, designating the grounds upon which the motion will be made, and specifying the particulars in which the conclusions of law are not consistent with the finding of facts, or in which the judgment or decree is not consistent with the special verdict. The said party must, within sixty days after giving such notice of intention, make the motion to the court, after giving due notice of the time of making such motion to the adverse party; but the hearing or consideration of such motion may be further continued by the court. En. Stats. 1897, 59.

Cal. Rep. Cit. 125, 241; 131, 325; 140, 169; 141, 165; 141, 166.

CHAPTER VIII.

THE MANNER OF GIVING AND ENTERING JUDGMENT.

- § 664. Judgment to be entered in twenty-four hours, etc.
- § 665. Case may be brought before the court for argument.
- § 666. When counterclaim established exceeds plaintiff's demand.
- § 667. In replevin, judgment to be in the alternative, and with damages. Gold coin or currency judgment.
- § 668. Judgment book to be kept by the clerk.
- § 669. If a party die after verdict, judgment may be entered, but not to be a lien.
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- § 674. Transcript to be filed in any county, and judgment to become a lien there.
- § 675. Satisfaction of a judgment, how made.
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- § 676. Defendant in suit to set aside fraudulent conveyance may give bond.
- § 677. Bond, condition in and amount of.
- § 677½. Bond, filing of.
- § 678. Objections to sureties.
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- § 679. Objection because estimated value in bond less than market value.
- § 679½. Sureties, how justify.
- § 680. Bond, when becomes effective.
- § 680½. Judgment may be rendered on bond when.

§ 664. Judgment to be entered in twenty-four hours, etc. When trial by jury has been had, judgment must be entered by the clerk, in conformity to the verdict, within twenty-four hours after the rendition of the verdict, unless the court order the case to be reserved for argument or further consideration, or grant a stay of proceedings. En. p. 453 March 11, 1872.

Cal. Rep. Cit. 50, 524; 75, 565; 76, 534; 79, 73; 97, 425; 97, 426; 126, 324; 135, 611; 135, 612.

Prac. Act, sec. 197. En. April 29, 1851.

Cal. Rep. Cit. 28, 70; 28, 418; 28, 420.

Reserving, for argument or further consideration: Post, sec. 665.

Stay of proceedings by appeal: Post, sec. 949.

Arrest of defendant: Sec. 684.

§ 665. Case may be brought before the court for argument. When the case is reserved for argument or further consideration, as mentioned in the last section, it may be

brought by either party before the court for argument. En. March 11, 1872.

Prac. Act, sec. 198. En. April 29, 1851. Am'd. 1854, 62.
Cal. Rep. Cit. 28, 420.

§ 666. When counterclaim established exceeds plaintiff's demand. If a counterclaim, established at the trial, exceed the plaintiff's demand, judgment for the defendant must be given for the excess; or if it appear that the defendant is entitled to any other affirmative relief, judgment must be given accordingly. En. March 11, 1872.

Prac. Act, sec. 199. En. April 29, 1851.

Cal. Rep. Cit. 19, 658; 27, 320; 32, 629; 41, 59.

Counterclaim, generally: Ante, secs. 438, 439; dismissal or nonsuit, where none: Ante, sec. 581, subd. 1; exceeding plaintiff's demand: Ante, sec. 626.

§ 667. In replevin, judgment to be in the alternative, and with damages. Gold coin or currency judgment. In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession or the value thereof in case a delivery cannot be had, and damages for the detention. If the property has been delivered to the plaintiff, and the defendant claim a return thereof, judgment for the defendant may be for a return of the property or the value thereof, in case a return cannot be had, and damages for taking and withholding the same. In an action on a contract or obligation in writing, for the direct payment of money, made payable in a specified kind of money or currency, judgment for the plaintiff, whether it be by default or after verdict, may follow the contract or obligation, and be made payable in the kind of money or currency specified therein; and in all actions for the recovery of money, if the plaintiff allege in his complaint that the same was understood and agreed by the respective parties to be payable in a specified kind of money or currency, and this fact is admitted by the default of the defendant or established by evidence, the judgment for the plaintiff must be made payable in the kind of money or currency so alleged in the complaint; and in an action against any person for the recovery of money received by such person in a fiduciary capacity, or to the use of another, judgment for the plaintiff must be made payable in the kind of money or currency so received by such person. En. March 11, 1872.

Cal. Rep. Cit. 54, 193; 54, 195; 56, 459; 61, 97; 63, 552; 65, 238; 66, 487; 67, 606; 68, 6; 71, 504; 78, 577; 78, 578; 83, 548; 86, 483; 87, 346; 87, 347; 89, 463; 89, 504; 90, 560; 91, 292; 92, 225; 101, 239; 104, 689; 114, 454; 119, 322; 130, 193; 130, 236; 132, 319; 133, 85; 142, 309.

Prac. Act, sec. 200. En. April 29, 1851. Am'd. 1863, 687; 1869-70, 295.

Cal. Rep. Cit. 7, 571; 11, 277; 24, 149; 26, 434; 41, 518; 45, 77; 46, 289; 49, 314; 142, 311.

Money, how computed and stated: See Pol. Code, sec. 3274.

Replevin—Judgment, verdict: Ante, sec. 627; value, correcting affidavit of: Ante, sec. 473.

Execution: Post, sec. 682, subd. 5.

Replevin, return to defendant: See ante, secs. 514, 627.

Specific money or currency, fiduciary capacity: Post, sec. 1407.

§ 668. Judgment book to be kept by the clerk. The clerk must keep, with the records of the court, a book to be called the "judgment book," in which judgments must be entered. En. March 11, 1872.

Cal. Rep. Cit. 72, 193; 76, 373; 84, 488; 99, 515; 102, 623; 104, 552; 110, 227; 126, 649; 126, 685; 134, 377; 140, 33.

Prac. Act, sec. 201. En. April 29, 1851.

Register of actions: Post, sec. 1052.

§ 669. If a party die after verdict, judgment may be entered, but not to be a lien. If a party die after a verdict or decision upon any issue of fact, and before judgment, the court may nevertheless render judgment thereon. Such judgment is not a lien on the real property of the deceased party, but is payable in the course of administration on his estate. En. March 11, 1872.

Cal. Rep. Cit. 108, 482; 108, 483; 124, 230.

Prac. Act, sec. 202. En. April 29, 1851.

Cal. Rep. Cit. 29, 367; 108, 483.

Payable in course of administration: Post, sec. 1506, and see sec. 1504.

Death, suggestion of: Ante, sec. 385.

Executor, etc., judgment against, form of: Post, sec. 1504.

§ 670. Judgment-roll, what to constitute. Immediately after entering the judgment, the clerk must attach together

and file the following papers, which constitute the judgment-roll:

1. In case the complaint be not answered by any defendant, the summons, with the affidavit or proof of service; the complaint with a memorandum indorsed thereon that the default of the defendant in not answering was entered, and a copy of the judgment; and in case where the service so made be by publication, the affidavit for publication of summons, and the order directing the publication of summons, must also be included.

2. In all other cases the pleadings, a copy of the verdict of the jury, or finding of the court, or referee, all bills of exceptions taken and filed, and a copy of any order made on demurrer or relating to the change of parties and a copy of the judgment; if there are two or more defendants in the action, and any one of them has allowed judgment to pass against him by default, the summons, with proof of its service on such defendant, must also be added to the other papers mentioned in this subdivision; and if the service on such defaulting defendant be by publication, then the affidavit for publication, and the order directing the publication of the summons in such cases must also be included. En. March 11, 1872. Am'd. 1873-4, 319; 1875-6, 93; 1895, 45.

Cal. Rep. Cit. 47, 641; 47, 642; 53, 283; 55, 44; 56, 491; 57, 240; 61, 163; 64, 542; 64, 592; 65, 118; 72, 88; 75, 378; 77, 230; 78, 385; 79, 267; 79, 503; 79, 602; 85, 579; 86, 400; 87, 154; 87, 266; 89, 486; 93, 606; 95, 455; 95, 638; 97, 92; 97, 182; 98, 109; 98, 283; 99, 281; 99, 515; 100, 613; 102, 623; 103, 20; 104, 246; 104, 550; 104, 552; 105, 111; 110, 560; 115, 270; 115, 691; 120, 38; 121, 12; 123, 79; 126, 347; 133, 255; 134, 429; 139, 697; 140, 357; 140, 675; 146, 213. Subd. 1—68, 425; 73, 601; 119, 109; 137, 428; 143, 677; 144, 416; 145, 605. Subd. 2—54, 546; 90, 60; 124, 224; 125, 227; 130, 406.

Prac. Act, sec. 203. En. April 29, 1851. Am'd. 1862, 119; 1865-6, 846.

Cal. Rep. Cit. 27, 109; 28, 174; 28, 305; 28, 418; 32, 174; 33, 512; 33, 563; 34, 403; 34, 425; 34, 614; 36, 114; 41, 137; 49, 308; 74, 501.

Judgment-roll in criminal cases: See Pen. Code, sec. 1207.

Clerk's powers and duties, county clerk: See Pol. Code, secs. 4204, 4205.

§ 671. Judgment lien, when it begins and when it expires. Immediately after filing the judgment-roll, the clerk must make the proper entries of the judgment, under appropriate heads, in the docket kept by him; and from the time the judgment is docketed it becomes a lien upon all the real property of the judgment debtor not exempt from execution in the county, owned by him at the time, or which he may afterwards acquire, until the lien ceases. The lien continues for five years, unless the enforcement of the judgment be stayed on appeal by the execution of a sufficient undertaking as provided in this code, in which case the lien of the judgment and any lien by virtue of an attachment that has been issued and levied in the action ceases. En. March 11, 1872. Am'd. 1873-4, 320; 1895, 36.

Cal. Rep. Cit. 55, 533; 61, 147; 61, 286; 61, 287; 70, 156; 95, 389; 97, 204; 97, 206; 102, 623; 105, 111; 111, 499; 112, 93; 114, 547; 119, 22; 119, 94; 124, 230; 127, 11; 132, 128; 137, 356; 138, 303; 142, 538; 142, 539.

Prac. Act, sec. 204. En. April 29, 1851.

Cal. Rep. Cit. 6, 134; 14, 57; 25, 346; 25, 347; 25, 350; 25, 351; 25, 352; 25, 357; 25, 359; 28, 525; 31, 397; 37, 146; 39, 144; 46, 656; 49, 194.

Judgment docket: See post, secs. 672-674.

Recording transcript of docket in another county: Post, sec. 674.

Judgment after decedent's death, on verdict, etc., before: Post, sec. 1506.

Undertaking on appeal: Post, secs. 941 et seq.

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§ 672. Docket, how kept, and what to contain. The docket mentioned in the last section is a book which the clerk keeps in his office, with each page divided into eight columns, and headed as follows: Judgment debtors; judgment creditors; judgment—time of entry; where entered in judgment book; appeals—when taken; judgment of appellate court; satisfaction of judgment; when entered. If judgment be for the recovery of money or damages, the amount must be stated in the docket under the head of judgment; if the judgment be for any other relief, a

memorandum of the general character of the relief granted must be stated. The names of the defendants must be entered in alphabetical order. En. March 11, 1872.

Cal. Rep. Cit. 61, 286; 90, 399; 102, 623; 124, 676.

Prac. Act, sec. 205. En. April 29, 1851.

Cal. Rep. Cit. 50, 517.

Docketing judgment: Ante, sec. 671.

Duty of clerk to keep docket: Pol. Code, sec. 4204.

§ 673. Docket to be opened for inspection without charge. The docket kept by the clerk is open at all times, during the office hours, for the inspection of the public, without charge. The clerk must arrange for several dockets kept by him in such a manner as to facilitate their inspection. En. March 11, 1872.

Prac. Act, sec. 206. En. April 29, 1851.

Public writings, open to inspection: Post, secs. 1892, 1893.

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§ 674. Transcript to be filed in any county, and judgment to become a lien there. A transcript of the original docket, certified by the clerk, may be filed with the recorder of any other county, and from the time of the filing the judgment becomes a lien upon all the real property of the judgment debtor, not exempt from execution, in such county, owned by him at the time, or which he may afterwards, and before the lien expires, acquire. The lien continues for two years, unless the judgment be previously satisfied. En. March 11, 1872.

Cal. Rep. Cit. 100, 591; 138, 302; 138, 303.

Prac. Act, sec. 207. En. April 29, 1851.

Judgment may be recorded without acknowledgment: Civ. Code, sec. 1159.

Recording judgment in county where land situated: Sec. 400, ante; but see sec. 78.

Recording generally: Civ. Code, secs. 1158 et seq.

Justice's court judgment, abstract creates lien: Post, sec. 900.

§ 675. Satisfaction of a judgment, how made. Satisfaction of a judgment may be entered in the clerk's docket upon an execution returned satisfied, or upon an acknowl-

edgment of satisfaction filed with the clerk made in the manner of an acknowledgment of a conveyance of real property, by the judgment creditor, or by his indorsement on the face, or on the margin of the record of the judgment, or by the attorney, unless a revocation of his authority is filed. Whenever a judgment is satisfied in fact, otherwise than upon an execution, the party or attorney must give such acknowledgment, or make such indorsement, and upon motion the court may compel it, or may order the entry of satisfaction to be made without it. En. March 11, 1872. Am'd. 1873-4, 320.

Cal. Rep. Cit. 60, 621; 71, 448; 108, 286; 130, 277.

Prac. Act, sec. 208. En. April 29, 1851.

Cal. Rep. Cit. 28, 418.

Acknowledgments—Justices of the supreme court, judges of superior courts, and justices of the peace, and police judges, within certain limits, have power to take and certify acknowledgments of satisfaction of judgments: Ante, sec. 179.

Attorney, power to bind client: Ante, secs. 283-285.

§ 675a. Satisfaction of mortgage recorded. Whenever a mortgage on real property is foreclosed in this state and the property covered by such mortgage is sold under and pursuant to the decree of foreclosure entered in the action in which such foreclosure is had, it shall be the duty of the sheriff, or commissioner making the sale, as the case may be, within five days after the purchaser at the sale becomes entitled to a deed from such sheriff, or commissioner thereunder, to enter upon the margin of the county records where such mortgage is recorded, if the same be recorded, a satisfaction of the same.

Such satisfaction shall be substantially in the following form:

Full satisfaction and discharge of the within mortgage by foreclosure is hereby entered this.....day of 19.. Decree of foreclosure entered the day of19.. in cause No..... entitled,vs..... Sale under such decree had the day of.....19....

En. Stats. 1905, 243.

.....
Sheriff (commissioner).

§ 676. Defendant in suit to set aside fraudulent conveyance may give bond. Where an action is commenced to set aside a transfer or conveyance of property on the grounds that such transfer or conveyance was made to

hinder, delay or defraud a creditor or creditors, the transferee or grantee to whom it is alleged the property was transferred or conveyed to hinder, delay or defraud creditors or the successors or assigns of such transferee or grantee, may give an undertaking as herein provided, and when such undertaking is given as herein provided, the transferee or grantee to whom it is alleged the property was transferred or conveyed to hinder, delay or defraud creditors, or the successors and assigns of such transferee or grantee, may sell, encumber, transfer, convey, mortgage, pledge or otherwise dispose of the property, or any part thereof, which is alleged to have been transferred or conveyed to hinder, delay or defraud creditors, so that the purchaser, encumbrancer, transferee, mortgagee, grantee or pledgee of such property, will take, own, hold and possess such property unaffected by such action and suit, or the judgment which may be rendered therein. En. Stats. 1903, 98.

§ 677. Bond, condition in and amount of. Such undertaking with two sureties shall be executed by the transferee or grantee to whom it is alleged the property was transferred or conveyed to hinder, delay or defraud creditors, or the successor or assign of such transferee or grantee, in double the estimated value of the property so alleged to have been transferred or conveyed; provided, in no case need such undertaking be for a greater sum than double the amount of the debt or liability alleged to be due and owing to the plaintiff in such action, commenced to set aside said transfer and conveyance; and where such estimated value of the property alleged so to have been conveyed is less than the sum alleged to be due and owing to the plaintiff in the action, such estimated value shall be stated in the undertaking, and said undertaking shall be conditioned that, if it be adjudged in said action that the transfer or conveyance was made to hinder, delay or defraud a creditor or creditors, then that the transferee or grantee or the said successor or assigns of such transferee or grantee giving such undertaking, will pay to the plaintiff in said action a sum equal to the value, as the same is estimated in said undertaking, of said property alleged to have been transferred or conveyed to hinder, delay or defraud creditors, not exceeding the sum alleged to be due and owing to the plaintiff in the action. En. Stats. 1903, 99.

§ 677½. Bond, filing of. Said undertaking shall be filed in the action in which said execution issued and a copy

thereof served upon the plaintiff or his attorney in said action. En. Stats. 1903, 99.

§ 678. **Objections to sureties.** Within ten days after service of the copy of undertaking the plaintiff may object to such undertaking on the ground of inability of the sureties, or either of them, to pay the sum for which they become bound in said undertaking, and upon the ground that the estimated value of the property therein is less than the market value of such property. Such objection to the undertaking shall be made in writing, specifying the ground or grounds of objection, and if the objection is made to the undertaking that the estimated value therein is less than the market value of the property, such objection shall specify the plaintiff's estimate of the market value of the property. Such written objection shall be served upon the said transferee or grantee, or the successor or assigns of such transferee or grantee giving such undertaking. En. Stats. 1903, 99.

§ 678½. **Justification of sureties.** Approval and disapproval of bond. When the sureties or either of them, are objected to, the surety or sureties so objected to shall justify before the court in which the action is commenced, upon ten days' notice of the time when they will so justify being given to the plaintiff, or plaintiff's attorney. Upon the hearing and examination into the sufficiency of a surety, witness may be required to attend and evidence may be procured and introduced in the same manner as in trial of civil cases. Upon such hearing and examination the court shall make its order, in writing, approving or disapproving the sufficiency of the sureties or surety on such undertaking. In case the court disapproves of the surety or sureties or any undertaking, a new undertaking may be filed and served, and to any undertaking given under the provisions of this act the same objection to the sureties may be made and the same proceedings had as in case of the first undertaking filed and served. En. Stats. 1903, 99.

§ 679. **Objection because estimated value in bond less than market value.** When objection is made to the undertaking upon the ground that the estimated value of the property, as stated in the undertaking, is less than the market value of the property, the transferee or grantee, or the successor or assigns of such transferee or grantee giving the undertaking may accept the estimated value stated by the plaintiff in said objection, and a new undertaking may at once be filed, with the plaintiff's estimate

stated therein as the estimated value, and no objection shall thereafter be made upon that ground; if the plaintiff's estimate of the market value is not accepted, the transferee or grantee, or the successor or assigns of the grantee or transferee giving such undertaking, upon ten days' notice to the plaintiff, shall move the court in which the action is pending to estimate the market value of the property, and upon the hearing of such motion, witnesses may be required to attend and testify, and evidence may be produced in the same manner as in the trial of civil actions. Upon the hearing of the motion the court shall estimate the market value of the property, and if the estimated value of the property as made by the court exceeds the estimated value as stated in the undertaking, a new undertaking shall be filed and served with the market value determined by the stated value therein as the estimated value of the property. En. Stats. 1903, 100.

§ 679½. Sureties, how justify. The sureties shall justify upon the undertaking as required by section one thousand and fifty-seven of the Code of Civil Procedure. En. Stats. 1903, 100.

§ 680. Bond, when becomes effective. The undertaking shall become effective for the purpose stated in section 1 of this act, ten days after service of copy thereof on the plaintiff, unless objection to such undertaking is made as in this act provided, and in case objection is so made to the undertaking filed and served, the same shall become effective for such purpose when an order is made by such court approving the sureties, when the surety or sureties are objected to, or affirming the estimate of the value of property when objection is made thereto, or in case any objection to the undertaking is sustained by the court when a new undertaking is filed and served as required by this act, to which no objection is made, or if made is not sustained by the court. En. Stats. 1903, 100.

§ 680½. Judgment may be rendered on bond when. If judgment be rendered in said action that the alleged transfer or conveyance was made to hinder, delay or defraud creditors, then judgment shall be rendered in such action without further proceeding in favor of plaintiff and against the principal and sureties on said undertaking for the sum for which said undertaking was executed according to the conditions thereof. En. Stats. 1903, 101.

TITLE IX.

OF THE EXECUTION OF THE JUDGMENT IN CIVIL ACTIONS.

Chapter I. The Execution, §§ 681-713½.

II. Proceedings Supplemental to the Execution, §§ 714-721.

CHAPTER I.

THE EXECUTION.

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- § 682. Who may issue the execution, its form, to whom directed, and what it shall require.
- § 683. When made returnable.
- § 684. Money judgments, and others, how enforced.
- § 685. Execution after five years.
- § 686. When execution may issue against the property of a party after his death.
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- § 710½. Claim of property, bond, amount of and conditions of.
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- § 712. Claim of property, justification, approval and disapproval.
- § 712½. Claim of property, bond, estimate of value and new bond.
- § 713. Claim of property, bond, justification of sureties.
- § 713½. Claim of property, bond, when becomes effectual.

Gen. Cit. to Chap.—Cal. Rep. Cit. 138, 648.

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Am'd. § 681. Within what time execution may issue. The party in whose favor judgment is given, may, at any time within five years after the entry thereof, have a writ of execution issued for its enforcement. En. March 11, 1872.

Cal. Rep. Cit. 61, 147; 81, 203; 81, 204; 81, 205; 86, 278; 86, 386; 92, 397; 94, 220; 94, 223; 99, 171; 99, 283; 107, 132; 111, 362; 114, 547; 137, 311; 138, 193; 138, 194.

Prac. Act, sec. 209. En. April 29, 1851.

Cal. Rep. Cit. 3, 215; 12, 468; 20, 55; 22, 650; 28, 70; 28, 418; 30, 622; 34, 614; 37, 13; 37, 146; 137, 311; 146, 742.

Time for execution, when extended: Post, sec. 685.

Appeal, stay of execution: Post, secs. 942-945.

Where money deposited by defendant, judgment is to be satisfied thereon by clerk: Ante, sec. 500.

Attachment—If judgment plaintiff has attached property, the sheriff must satisfy the judgment out of it: Ante, sec. 550.

Executor or administrator—No execution must issue upon judgment against, upon claims for money due from estate: Post, sec. 1504.

Receiver, in proceedings in aid of execution: Ante, sec. 564, subd. 4.

§ 682. Who may issue the execution, its form, to whom directed, and what it shall require. The writ of execution must be issued in the name of the people, sealed with the seal of the court, and subscribed by the clerk, and be directed to the sheriff, and it must intelligibly refer to the judgment, stating the court, the county where the judgment-roll is filed, and if it be for money, the amount thereof, and the amount actually due thereon, and if made

payable in a specified kind of money or currency, as provided in section six hundred and sixty-seven, the execution must also state the kind of money or currency in which the judgment is payable, and must require the sheriff substantially as follows:

1. If it be against the property of the judgment debtor, it must require the sheriff to satisfy the judgment, with interest, out of the personal property of such debtor, and if sufficient personal property cannot be found, then out of his real property; or if the judgment be a lien upon real property, then out of the real property belonging to him on the day when the judgment was docketed, or at any time thereafter; or if the execution be issued to a county other than the one in which the judgment was recovered, on the day when the transcript of the docket was filed in the office of the recorder of such county, stating such day, or any time thereafter;

2. If it be against real or personal property in the hands of the personal representatives, heirs, devisees, legatees, tenants, or trustees, it must require the sheriff to satisfy the judgment, with interest, out of such property;

3. If it be against the person of the judgment debtor, it must require the sheriff to arrest such debtor and commit him to the jail of the county until he pay the judgment with interest, or be discharged according to law;

4. If it be issued on a judgment made payable in a specified kind of money or currency, as provided in section six hundred and sixty-seven, it must also require the sheriff to satisfy the same in the kind of money or currency in which the judgment is made payable, and the sheriff must refuse payment in any other kind of money or currency; and in case of levy and sale of the property of the judgment debtor, he must refuse payment from any purchaser at such sale in any other kind of money or currency than that specified in the execution. The sheriff, collecting money or currency in the manner required by this chapter, must pay to the plaintiff or party entitled to recover the same, the same kind of money or currency received by him, and in case of neglect or refusal so to do, he shall be liable on his official bond to the judgment creditor in three times the amount of the money so collected;

5. If it be for the delivery of the possession of real or personal property, it must require the sheriff to deliver

the possession of the same, describing it, to the party entitled thereto, and may, at the same time, require the sheriff to satisfy any costs, damages, rents, or profits, recovered by the same judgment, out of the personal property of the person against whom it was rendered, and the value of the property for which the judgment was rendered to be specified therein if a delivery thereof cannot be had; and if sufficient personal property cannot be found, then out of the real property, as provided in the first subdivision of this section. En. March 11, 1872.

Cal. Rep. Cit. 53, 558; 79, 601; 94, 220; 121, 197; 131, 529; 137, 203; 140, 194; 145, 552; 145, 554. Subd. 1—119, 194; 131, 600. Subd. 4—130, 599.

Prac. Act, sec. 210. En. April 29, 1851. Am'd. 1863, 688.

Cal. Rep. Cit. 7, 571; 11, 277; 24, 149; 36, 166; 36, 167; 37, 132; 39, 144.

Contempt in interfering with: Post, secs. 1209, 1210.

Judgment a lien: Ante, secs. 671, 674.

Property leviable: Ante, sec. 542; post, sec. 688.

Levy without process a misdemeanor: See Pen. Code, sec. 146.

Subd. 4. Judgment payable in specified kind of money: See ante, sec. 667.

§ 683. **When made returnable.** The execution may be made returnable at any time not less than ten nor more than sixty days after its receipt by the sheriff, to the clerk with whom the judgment-roll is filed. When the execution is returned the clerk must attach it to the judgment-roll. If any real estate be levied upon, the clerk must record the execution and the return thereto at large, and certify the same under his hand as true copies, in a book to be called the "execution book," which book must be indexed with the names of the plaintiffs and defendants in execution, alphabetically arranged, and kept open at all times during office hours for the inspection of the public without charge. It is evidence of the contents of the originals whenever they or any part thereof may be destroyed or mutilated. En. March 11, 1872.

Cal. Rep. Cit. 94, 220; 94, 223; 146, 742.

Prac. Act, sec. 212. En. April 29, 1851. Am'd. 1866, 703.

Return, failure to make without delay, liability of sheriff: See Pol. Code, sec. 4179.

§ 684. Money judgments, and others, how enforced. When the judgment is for money or the possession of real or personal property, the same may be enforced by a writ of execution; and if the judgment direct that the defendant be arrested, the execution may issue against the person of the judgment debtor, after the return of an execution against his property unsatisfied in whole or part; when the judgment requires the sale of property, the same may be enforced by a writ reciting such judgment or the material parts thereof, and directing the proper officer to execute the judgment, by making the sale and applying the proceeds in conformity therewith; when the judgment requires the performance of any other act than as above designated, a certified copy of the judgment may be served upon the party against whom the same is rendered, or upon the person or officer required thereby or by law to obey the same, and obedience thereto may be enforced by the court. En. March 11, 1872. Am'd. 1873-4, 321.

Cal. Rep. Cit. 53, 558; 53, 559; 57, 9; 57, 10; 62, 630; 72, 263; 72, 264; 75, 414; 76, 542; 90, 185; 93, 143; 94, 220; 94, 223; 101, 204; 119, 197; 121, 197; 121, 342; 130, 599; 137, 87; 137, 203; 140, 194; 145, 554.

Prac. Act, sec. 213. En. April 29, 1851. Am'd. 1866, 703.

Cal. Rep. Cit. 30, 371.

Money, how computed and stated in: See Pol. Code, sec. 3274.

Writ of possession or restitution: Ante, sec. 380; post, sec. 1174.

Re-entry after dispossession: Post, sec. 1210.

Execution against the person, discharge of prisoner: Post, secs. 1143-1154.

Sale of property: See post, secs. 694 et seq.

Performance of any other act—Enforcing obedience: Post, secs. 1209 et seq.

§ 685. Execution after five years. In all cases, the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the court, upon motion, or by judgment for that purpose, founded upon supplemental pleadings; but nothing in this section shall be construed to revive a judgment for the recovery of money which shall have been barred by limita-

tion at the time of the passage of this act. En. March 11, 1872. Am'd. 1895, 38.

Cal. Rep. Cit. 61, 147; 81, 203; 81, 204; 86, 278; 86, 385; 121, 29; 121, 30; 137, 38; 145, 531; 145, 532.

Prac. Act, sec. 214. En. April 29, 1851. Am'd. 1861, 116; 1866, 704.

Cal. Rep. Cit. 8, 513; 17, 271; 22, 650; 29, 229; 37, 13; 37, 14; 37, 15; 37, 135; 37, 146.

§ 686. When execution may issue against the property of a party after his death. Notwithstanding the death of a party after the judgment, execution thereon may be issued, or it may be enforced as follows:

1. In case of the death of the judgment creditor, upon the application of his executor, or administrator, or successor in interest;

2. In case of the death of the judgment debtor, if the judgment be for the recovery of real or personal property, or the enforcement of a lien thereon. En. March 11, 1872.

Cal. Rep. Cit. 138, 259.

Prac. Act, sec. 215. En. April 29, 1851. Am'd. 1864, 452.

Cal. Rep. Cit. 29, 368; 37, 14.

Death of party—Effect on action: Ante, sec. 385; judgment after: Ante, sec. 669; execution after: Post, sec. 1505.

§ 687. Execution, how and to whom issued. Where the execution is against the property of the judgment debtor, it may be issued to the sheriff of any county in the state. Where it requires the delivery of real or personal property, it must be issued to the sheriff of the county where the property, or some part thereof, is situated. Executions may be issued, at the same time, to different counties. En. March 11, 1872.

Cal. Rep. Cit. 83, 459.

Prac. Act, sec. 216. En. April 29, 1851.

Any county in the state, process extends to: Sec. 78.

Execution requiring delivery of real and personal property: Ante, sec. 682, subd. 5.

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Act concerning execution of final process where new county formed: See post, Appendix, title Process.

§ 688. What shall be liable to be seized in execution. Not to be affected till a levy is made. All goods, chattels, moneys, and other property, both real and personal, or any interest therein of the judgment debtor, not exempt by law, and all property and rights of property seized and held under attachment in the action, are liable to execution. Shares and interests in any corporation or company, and debts and credits, and all other property, both real and personal, or any interest in either real or personal property, and all other property not capable of manual delivery, may be attached on execution, in like manner as upon writs of attachment. Gold dust must be returned by the officer as so much money collected at its current value, without exposing the same to sale. Until a levy, property is not affected by the execution. En. March 11, 1872.

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Cal. Rep. Cit. 52, 331; 54, 342; 57, 522; 58, 375; 65, 302; 72, 70; 77, 655; 94, 221; 99, 165; 100, 327; 101, 227; 118, 101; 119, 194; 122, 97; 131, 89; 133, 317; 138, 194; 146, 742.

Prac. Act, sec. 217. En. April 29, 1851. Am'd. 1854, 62; 1862, 568.

Cal. Rep. Cit. 6, 196; 7, 204; 13, 22; 34, 87; 34, 607; 37, 146; 39, 144; 54, 459; 119, 196.

Goodwill: Civ. Code, secs. 992, 993.

Franchise: Civ. Code, secs. 388-393.

Homestead: See Civ. Code, secs. 1241-1261. Sole traders: See post, secs. 1811-1821.

Levy: Ante, sec. 542.

Estates at will not subject to execution: See Civ. Code, sec. 765.

Exemptions, generally: Post, sec. 690.

§ 689. When property is claimed by a third party. Indemnity. If the property levied on be claimed by a third person as his property by a written claim verified by the oath of said claimant, setting out his title thereto, his right to the possession thereof, and stating the grounds of such title, and served upon the sheriff, the sheriff is not bound to keep the property unless the plaintiff, or the person in whose favor the writ of execution runs, on demand, indemnify the sheriff against such claim by an

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undertaking by at least two good and sufficient sureties; and no claim to such property is valid against the sheriff, or shall be received, or be notice of any rights, unless made as above provided. En. March 11, 1872. Am'd. 1891, 20.

Cal. Rep. Cit. 58, 438; 97, 483; 108, 145; 109, 241; 113, 363; 114, 295; 117, 40; 122, 334; 126, 42; 133, 84; 138, 444; 142, 459.

Prac. Act, sec. 218. En. April 29, 1851.

If the sheriff give notice to sureties of action brought against him, they are liable on the judgment: Post, sec. 1055.

§ 690. What exempt from execution. The following property is exempt from execution, except as herein otherwise specially provided:

1. Chairs, tables, desks, and books, to the value of two hundred dollars, belonging to the judgment debtor;

2. Necessary household, table, and kitchen furniture belonging to the judgment debtor, including one sewing-machine, stove, stove-pipes and furniture, wearing apparel, beds, bedding, and bedsteads, hanging pictures, oil paintings and drawings drawn or painted by any member of the family, and family portraits and their necessary frames, provisions and fuel actually provided for individual or family use, sufficient for three months, and three cows and their suckling calves, four hogs with their suckling pigs, and food for such cows and hogs for one month; also, one piano, one shotgun, and one rifle;

3. The farming utensils or implements of husbandry of the judgment debtor, not exceeding in value the sum of one thousand dollars; also, two oxen, or two horses, or two mules, and their harness, one cart or buggy and two wagons, and food for such oxen, horses, or mules, for one month; also, all seed, grain, or vegetables actually provided, reserved, or on hand for the purpose of planting or sowing at any time within the ensuing six months, not exceeding in value the sum of two hundred dollars; and seventy-five beehives; one horse and vehicle belonging to any person who is maimed or crippled, and the same is necessary in his business;

4. The tools or implements of a mechanic or artisan, necessary to carry on his trade; the notarial seal, records, and office furniture of a notary public; the instruments

and chest of a surgeon, physician, surveyor, or dentist, necessary to the exercise of their profession, with their professional libraries and necessary office furniture; the professional libraries of attorneys, judges, ministers of the gospel, editors, school teachers, and music teachers, and their necessary office furniture; including one safe and one typewriter; also the musical instruments of music teachers actually used by them in giving instructions, and all the indexes, abstracts, books, papers, maps and office furniture of a searcher of records necessary to be used in his profession; also, the typewriters, or other mechanical contrivances employed for writing in type, actually used by the owner thereof for making his living; also, one bicycle, when the same is used by its owner for the purpose of carrying on his regular business, or when the same is used for the purpose of transporting the owner to and from his place of business;

5. The cabin or dwelling of a miner, not exceeding in value the sum of five hundred dollars; also, his sluices, pipes, hose, windlass, derrick, cars, pumps, tools, implements, and appliances necessary for carrying on any mining operations, not exceeding in value the aggregate sum of five hundred dollars; and two horses, mules, or oxen with their harness, and food for such horses, mules, or oxen for one month, when necessary to be used on any whim, windlass, derrick, car pump or hoisting gear; and also his mining claim, actually worked by him, not exceeding in value the sum of one thousand dollars;

6. Two horses, two oxen, or two mules, and their harness, and one cart or wagon, one dray or truck, one coupe, one hack, or carriage, for one or two horses, by the use of which a cartman, drayman, truckman, huckster, peddler, hackman, teamster, or other laborer habitually earns his living; and one horse, with vehicle and harness or other equipments, used by a physician, surgeon, constable, or minister of the gospel, in the legitimate practice of his profession or business; with food for such oxen, horses, or mules for one month;

7. One fishing-boat and net, not exceeding the total value of five hundred dollars, the property of any fisherman, by the lawful use of which he earns his livelihood;

8. Poultry not exceeding in value seventy five dollars;

9. The wages and earnings of all seamen, sea-going fishermen and sealers, not exceeding three hundred dol-

lars, regardless of where or when earned, and in addition to all other exemptions otherwise provided by any law;

10. The earnings of the judgment debtor for his personal services rendered at any time within thirty days next preceding the levy of execution or attachment, when it appears, by the debtor's affidavit, or otherwise, that such earnings are necessary for the use of his family, residing in this state, supported in whole or in part by his labor; but where debts are incurred by any such person, or his wife or family, for the common necessities of life, or have been incurred at a time when the debtor had no family, residing in this state, supported in whole or in part by his labor, the one-half of such earnings above mentioned is nevertheless subject to execution, garnishment, or attachment to satisfy debts so incurred;

11. The shares held by a member of a homestead association duly incorporated, not exceeding in value one thousand dollars if the person holding the shares is not the owner of a homestead under the laws of this state;

12. All the nautical instruments and wearing apparel of any master, officer, or seaman of any steamer or other vessel;

13. All fire engines, hooks and ladders, with the carts, trucks and carriages, hose buckets, implements, and apparatus thereunto appertaining, and all furniture and uniforms of any fire company or department organized under the laws of this state;

14. All arms, uniforms, and accoutrements required by law to be kept by any person, and also one gun, to be selected by the debtor;

15. All court-houses, jails, public offices, and buildings, lots, grounds, and personal property. the fixtures, furniture, books, papers and appurtenances belonging and pertaining to the jail and public offices belonging to any county of this state; and all cemeteries, public squares, parks, and places, public buildings, town halls, markets, buildings for the use of fire departments and military organizations, and the lots and grounds thereto belonging and appertaining, owned or held by any town or incorporated city, or dedicated by such town or city to health. ornament, or public use, or for the use of any fire or military company organized under the laws of this state;

16. All material, not exceeding one thousand dollars in value, purchased in good faith for use in the construction, alteration, or repair of any building, mining claim or other improvement, as long as in good faith the same is about to be applied to the construction, alteration, or repair of such building, mining claim, or other improvement;

17. All machinery, tools and implements, necessary in and for boring, sinking, putting down and constructing surface or artesian wells; also the engines necessary for operating such machinery, implements, tools, etc., also all trucks necessary for the transportation of such machinery, tools, implements, engines, etc.; provided, that the value of all the articles exempted under this subdivision shall not exceed one thousand dollars;

18. All moneys, benefits, privileges, or immunities accruing or in any manner growing out of any life insurance, if the annual premiums paid do not exceed five hundred dollars, and if they exceed that sum, a like exemption shall exist which shall bear the same proportion to the moneys, benefits, privileges, and immunities so accruing or growing out of such insurance that said five hundred dollars bears to the whole annual premiums paid;

19. Shares of stock in any building and loan association to the value of one thousand dollars.

No article, however, or species of property mentioned in this section, is exempt from execution issued upon a judgment recovered for its price, or upon a judgment of foreclosure of a mortgage or other lien thereon. En. March 11, 1872. Am'd. 1875-6, 94; 1877-8, 101; 1887, 99; 1897, 180; 1899, 19; 1900-01, 21; 1903, 114.

Cal. Rep. Cit. 62, 400; 62, 406; 64, 291; 72, 244; 77, 195; 77, 404; 99, 203; 102, 536; 122, 439. Subd. 2.—140, 623. Subd. 3—65, 507; 67, 400; 71, 77; 119, 42; 121, 538; 122, 436. Subd. 4—87, 293. Subd. 5—98, 479. Subd. 6—54, 640; 64, 290; 72, 244; 83, 196; 91, 276. Subd. 10—75, 249; 142, 195. Subd. 11—123, 401. Subd. 12—121, 354; 122, 97. Subd. 13—90, 546. Subd. 18—145, 778.

Prac. Act, sec. 219. En. April 29, 1851. Am'd. 1854, 62; 1862, 573; 1864, 523; 1869-70, 384; 1871-2, 864.

Cal. Rep. Cit. 34, 305; 38, 383; 71, 78. Subd. 3—77, 195. Subd. 6—77, 195.

§ 691. Writ, how executed. The sheriff must execute the writ against the property of the judgment debtor, by levying on a sufficient amount of property, if there be sufficient, collecting or selling the things in action, and selling the other property, and paying to the plaintiff or his attorney so much of the proceeds as will satisfy the judgment. Any excess in the proceeds over the judgment and accruing costs must be returned to the judgment debtor, unless otherwise directed by the judgment or order of the court. When there is more property of the judgment debtor than is sufficient to satisfy the judgment and accruing costs within the view of the sheriff, he must levy only on such part of the property as the judgment debtor may indicate, if the property indicated be amply sufficient to satisfy the judgment and costs. En. March 11, 1872. Am'd. 1873-4, 321.

Cal. Rep. Cit. 58, 455; 108, 287; 119, 194; 119, 195; 131, 690.

Prac. Act, sec. 220. En. April 29, 1851.

Cal. Rep. Cit. 7, 204; 13, 22; 34, 87.

Justification of sheriff: See Pol. Code, sec. 4187.

Sheriff must execute writ: Pol. Code, sec. 4180.

Neglect of sheriff to levy or sell, liability: See Pol. Code, sec. 4180.

Directions to sheriff, effect of: See Pol. Code, sec. 4185.

Selling property: Post, secs. 692 et seq.

Paying over proceeds: Pol. Code, secs. 4181, 4186.

Debts, payment of to sheriff: Ante, sec. 544; post, sec. 716.

§ 692. Notice of sale under execution, how given. Before the sale of property on execution, notice thereof must be given as follows:

1. In case of perishable property: by posting written notice of the time and place of sale in three public places of the township or city where the sale is to take place, for such time as may be reasonable, considering the character and condition of the property.

2. In case of other personal property: by posting a similar notice in three public places in the township or city where the sale is to take place, for not less than five nor more than ten days.

3. In case of real property: by posting a similar notice, particularly describing the property, for twenty days, in three public places of the township or city where the property is situated, and also where the property is to be sold, and publishing a copy thereof, once a week for the same period, in some newspaper published in the county, if there be one.

4. When the judgment under which the property is to be sold is made payable in a specified kind of money or currency, the several notices required by this section must state the kind of money or currency in which bids may be made at such sale, which must be the same as that specified in the judgment. En. March 11, 1872. Am'd. 1873-4, 322.

Cal. Rep. Cit. 63, 518; 100, 215; 100, 216; 100, 219; 101, 204; 119, 197. Subd. 3—119, 194.

Prac. Act, sec. 221. En. April 29, 1851. Am'd. 1863, 689.

Sale of vessels, notice of: Post, secs. 824, 827.

Sale without notice: Post, sec. 693.

Perishable property, sale under attachment: Ante, sec. 547.

Specified kind of money: Ante, sec. 682, subd. 4.

§ 693. Selling without notice, what penalty attached. An officer selling without the notice prescribed by the last section forfeits five hundred dollars to the aggrieved party, in addition to his actual damages; and a person willfully taking down or defacing the notice posted, if done before the sale or the satisfaction of the judgment (if the judgment be satisfied before sale), forfeits five hundred dollars. En. March 11, 1872.

Cal. Rep. Cit. 63, 518; 63, 519; 100, 215; 100, 219; 101, 204; 136, 3.

Prac. Act, sec. 222. En. April 29, 1851.

Cal. Rep. Cit. 3, 289; 22, 264.

§ 694. Sales, how conducted. Neither the officer conducting it nor his deputy to be a purchaser. Real and personal property, how sold. Judgment debtor, if present, may direct order of sale, and the officer shall follow his directions. All sales of property under execution must be made at auction to the highest bidder, between the hours

of nine in the morning and five in the afternoon. After sufficient property has been sold to satisfy the execution, no more can be sold. Neither the officer holding the execution nor his deputy can become a purchaser or be interested in any purchase at such sale. When the sale is of personal property, capable of manual delivery, it must be within view of those who attend the sale, and be sold in such parcels as are likely to bring the highest price; and when the sale is of real property, consisting of several known lots or parcels, they must be sold separately; or when a portion of such real property is claimed by a third person, and he requires it to be sold separately, such portion must be thus sold. The judgment debtor, if present at the sale, may also direct the order in which property, real or personal, shall be sold, when such property consists of several known lots or parcels, or of articles which can be sold to advantage separately, and the sheriff must follow such directions. En. March 11, 1872.

Cal. Rep. Cit. 51, 553; 54, 351; 57, 9; 57, 10; 58, 455; 65, 18; 86, 328; 90, 185; 91, 39; 113, 562; 127, 165; 129, 164; 142, 305.

Prac. Act, sec. 223. En. April 29, 1851.

Cal. Rep. Cit. 6, 52; 21, 58; 54, 351.

Auctioneer, sheriff as: Pol. Code, sec. 3291.

§ 695. If purchaser refuses to pay purchase money, what proceedings. If a purchaser refuse to pay the amount bid by him for property struck off to him at a sale under execution, the officer may again sell the property at any time to the highest bidder, and if any loss be occasioned thereby, the officer may recover the amount of such loss, with costs, from the bidder so refusing, in any court of competent jurisdiction. En. March 11, 1872. Am'd. 1873-4, 323.

Cal. Rep. Cit. 131, 687; 131, 697; 131, 702.

Prac. Act, sec. 224. En. April 29, 1851.

Cal. Rep. Cit. 8, 26; 9, 94; 22, 512.

§ 696. Officer may refuse such purchaser's bid after. When a purchaser refuses to pay, the officer may, in his discretion, thereafter, reject any subsequent bid of such person. En. March 11, 1872. Am'd. 1873-4, 323.

Prac. Act, sec. 225. En. April 29, 1851.

§ 697. These two sections not to make officer liable beyond a certain amount. The two preceding sections must not be construed to make the officer liable for any more than the amount bid by the second or subsequent purchaser, and the amount collected from the purchaser refusing to pay. En. March 11, 1872.

Prac. Act, sec. 226. En. April 29, 1851.

§ 698. Personal property, not capable of manual delivery, how delivered to purchaser. When the purchaser of any personal property, capable of manual delivery, pays the purchase money, the officer making the sale must deliver to the purchaser the property, and if desired, execute and deliver to him a certificate of the sale. Such certificate conveys to the purchaser all the right which the debtor had in such property on the day the execution or attachment was levied. En. March 11, 1872.

Cal. Rep. Cit. 123, 315; 131, 11.

Prac. Act, sec. 227. En. April 29, 1851.

Cal. Rep. Cit. 13, 22.

Certificate of sale: See next section.

§ 699. Personal property not capable of manual delivery, how sold and delivered. When the purchaser of any personal property, not capable of manual delivery, pays the purchase money, the officer making the sale must execute and deliver to the purchaser a certificate of sale. Such certificate conveys to the purchaser all the right which the debtor had in such property on the day the execution or attachment was levied. En. March 11, 1872.

Prac. Act, sec. 228. En. April 29, 1851.

Cal. Rep. Cit. 13, 22; 34, 87.

Attachment, personalty not capable of manual delivery: Ante, sec. 542.

§ 700. Real property, when absolute sale or not. In the latter case, what the certificate must contain. Upon a sale of real property, the purchaser is substituted to and acquires all the right, title, interest, and claim of the judgment debtor thereto; and when the estate is less than a leasehold of two years' unexpired term, the sale is abso-

lute. In all other cases, the property is subject to redemption, as provided in this chapter. The officer must give to the purchaser a certificate of sale, containing:

1. A particular description of the real property sold;
2. The price bid for each distinct lot or parcel;
3. The whole price paid;
4. When subject to redemption, it must be so stated.

And when the judgment under which the sale has been made, is made payable in a specified kind of money or currency, the certificate must also show the kind of money or currency, in which such redemption may be made, which must be the same as that specified in the judgment. A duplicate of such certificate must be filed by the officer in the office of the recorder of the county. En. March 11, 1872.

Cal. Rep. Cit. 55, 533; 55, 534; 55, 539; 55, 542; 58, 375; 75, 556; 102, 680; 116, 230; 117, 75; 121, 600; 122, 513; 124, 166; 128, 20; 138, 391; 138, 392; 142, 539; 143, 666.

Prac. Act, sec. 229. En. April 29, 1851. Am'd. 1862, 569; 1863, 689.

Cal. Rep. Cit. 2, 596; 4, 143; 31, 300; 31, 317; 31, 318; 138, 392.

Specified kind of money: Secs. 682, subd. 4, 692.

Certificate, recording: Pol. Code, sec. 4237.

Sheriff's deed, and what passes by it: Post, sec. 705.

Injunction to restrain person in possession from waste: Post, sec. 745. Recovery of damages for waste: Post, sec. 746.

§700a Writ of assistance: Post, sec. 1210.

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§ 701. Real property so sold, by whom it may be redeemed. Property sold subject to redemption, as provided in the last section, or any part sold separately, may be redeemed in the manner hereinafter provided by the following persons; or their successors in interest:

1. The judgment debtor, or his successor in interest, in the whole or any part of the property;

2. A creditor having a lien by judgment or mortgage on the property sold, or on some share or part thereof, subsequent to that on which the property was sold. The persons mentioned in the second subdivision of this section are, in this chapter, termed redemptioners. En. March 11, 1872.

Cal. Rep. Cit. 51, 540; 55, 175; 55, 534; 55, 535; 55, 539; 60, 160; 66, 120; 66, 121; 105, 101; 105, 102;

113, 555; 117, 75; 122, 512; 138, 391; 138, 393.
Subd. 1—71, 480; 97, 51. Subd. 2—124, 231; 144,
576.

Prac. Act, sec. 230. En. April 29, 1851.

Cal. Rep. Cit. 4, 143; 27, 371; 31, 300; 35, 722; 37,
135; 44, 334; 47, 815.

Redemption, mode of: Post, secs. 702 et seq.

Judgment creditor, redemption by: Post, sec. 1503.

Parties entitled to redeem: Ante, secs. 346, 347.

§ 702. When it may be redeemed, and redemption money. The judgment debtor, or redemptioner, may redeem the property from the purchaser at any time within twelve months after the sale on paying the purchaser the amount of his purchase, with one per cent per month thereon in addition, up to the time of redemption, together with the amount of any assessment or taxes which the purchaser may have paid thereon after purchase, and interest on such amount. And if the purchaser be also a creditor, having a prior lien to that of the redemptioner, other than the judgment under which said purchase was made, the amount of such lien with interest. En. March 11, 1872. Am'd. 1875-6, 96; 1895, 226; 1897, 41.

Cal. Rep. Cit. 52, 647; 55, 534; 61, 332; 68, 225; 100,
453; 117, 74; 117, 75; 126, 417; 127, 534; 133, 518;
134, 344; 137, 667; 137, 670; 138, 393; 146, 702.

Prac. Act, sec. 231. En. April 29, 1851. Am'd. 1859,
139; 1860, 302.

Cal. Rep. Cit. 4, 143; 9, 118; 47, 84; 47, 85; 52, 646;
52, 647; 52, 648.

§ 703. When judgment debtor or other redemptioner may redeem. If property be so redeemed by a redemptioner, another redemptioner may, within sixty days after the last redemption, again redeem it from the last redemptioner on paying the sum paid on such last redemption, with two per cent thereon in addition, and the amount of any assessment or taxes which the last redemptioner may have paid thereon after the redemption by him, with interest on such amount, and, in addition, the amount of any liens held by said last redemptioner prior to his own, with interest, but the judgment under which the property was sold need not be so paid as a lien. The property may be again, and as often as a redemp-

tioner is so disposed, redeemed from any previous redemptioner within sixty days after the last redemption, on paying the sum paid on the last previous redemption, with two per cent thereon in addition, and the amounts of any assessments or taxes which the last previous redemptioner paid after the redemption by him, with interest thereon, and the amount of any liens, other than the judgment under which the property was sold, held by the last redemptioner previous to his own, with interest. Written notice of redemption must be given to the sheriff and a duplicate filed with the recorder of the county, and if any taxes or assessments are paid by the redemptioner, or if he has or acquires any lien other than that upon which the redemption was made, notice thereof must in like manner be given to the sheriff and filed with the recorder; and if such notice be not filed, the property may be redeemed without paying such tax, assessment, or lien. If no redemption be made within twelve months after the sale, the purchaser, or his assignee, is entitled to a conveyance; or if so redeemed, whenever sixty days have elapsed, and no other redemption has been made, and notice thereof given, and the time for redemption has expired, the last redemptioner, or his assignee, is entitled to a sheriff's deed; but, in all cases, the judgment debtor shall have the entire period of twelve months from the date of the sale to redeem the property. If the judgment debtor redeem, he must make the same payments as are required to effect a redemption by a redemptioner. If the debtor redeem, the effect of the sale is terminated, and he is restored to his estate. Upon a redemption by the debtor, the person to whom the payment is made must execute and deliver to him a certificate of redemption, acknowledged or proved before an officer authorized to take acknowledgments of conveyances of real property. Such certificate must be filed and recorded in the office of the recorder of the county in which the property is situated, and the recorder must note the record thereof in the margin of the record of the certificate of sale. En. March 11, 1872. Am'd. 1873-4, 323; 1895, 226; 1897, 41.

Cal. Rep. Cit. 52, 647; 55, 534; 55, 535; 55, 542; 66, 120; 66, 121; 113, 556; 124, 166; 131, 673; 138, 393; 138, 655; 143, 667.

Prac. Act, sec. 232. En. April 29, 1851. Am'd. 1859, 140; 1860, 302.

Cal. Rep. Cit. 9, 420; 31, 300; 52, 647.

Writ of assistance: Sec. 682, ante.

Certificate, recording: Pol. Code, sec. 4237.

§ 704. In cases of redemption, to whom the payments are to be made. The payments mentioned in the last two sections may be made to the purchaser or redemptioner, or for him to the officer who made the sale. When the judgment under which the sale has been made is payable in a specified kind of money or currency, payments must be made in the same kind of money or currency, and a tender of the money is equivalent to payment. En. March 11, 1872.

Cal. Rep. Cit. 122, 516; 143, 667.

Prac. Act, sec. 233. En. April 29, 1851. Am'd. 1863, 690.

Cal. Rep. Cit. 4, 144.

Specified kind of money: Ante, secs. 682, subd. 4, 692.

§ 705. What a redemptioner must do in order to redeem. A redemptioner must produce to the officer or person, from whom he seeks to redeem, and serve with his notice to the sheriff:

1. A copy of the docket of the judgment under which he claims the right to redeem, certified by the clerk of the court, or of the county where the judgment is docketed, or if he redeem upon a mortgage or other lien, a note of the record thereof, certified by the recorder;

2. A copy of any assignment necessary to establish his claim, verified by the affidavit of himself, or of a subscribing witness thereto;

3. An affidavit by himself or his agent, showing the amount then actually due on the lien. En. March 11, 1872. Cal. Rep. Cit. 51, 540; 113, 554; 113, 555.

Prac. Act, sec. 234. En. April 29, 1851.

Cal. Rep. Cit. 14, 57; 49, 194.

§ 706. Until the expiration of redemption time court may restrain waste on the property. What considered waste. Until the expiration of the time allowed for redemption, the court may restrain the commission of waste on the property, by order granted with or without notice, on the application of the purchaser or the judgment creditor. But it is not waste for the person in possession of the property at the time of sale, or entitled to possession after-

ward, during the period allowed for redemption, to continue to use it in the same manner in which it was previously used; or to use in the ordinary course of husbandry; or to make the necessary repairs of buildings thereon; or to use wood or timber on the property therefor; or for the repair of fences; or for fuel in his family, while he occupies the property. En. March 11, 1872.

Cal. Rep. Cit. 114, 427; 136, 310; 138, 393.

Prac. Act, sec. 235. En. April 29, 1851.

Cal. Rep. Cit. 22, 194.

Waste: Post, secs. 745-746.

§ 707. **Rents and profits.** The purchaser, from the time of the sale until a redemption, and a redemptioner, from the time of his redemption until another redemption, is entitled to receive, from the tenant in possession, the rents of the property sold, or the value of the use and occupation thereof. But when any rents or profits have been received by the judgment creditor or purchaser, or his or their assigns, from the property thus sold preceding such redemption, the amounts of such rents and profits shall be a credit upon the redemption money to be paid; and if the redemptioner or judgment debtor, before the expiration of the time allowed for such redemption demands in writing of such purchaser or creditor, or his assigns a written and verified statement of the amounts of such rents and profits thus received, the period for redemption is extended five days after such sworn statement is given by such purchaser or his assigns to such redemptioner or debtor. If such purchaser or his assigns shall, for a period of one month from and after such demand, fail or refuse to give such statement, such redemptioner or debtor may bring an action in any court of competent jurisdiction to compel an accounting and disclosure of such rents and profits, and until fifteen days from and after the final determination of such action, the right of redemption is extended to such redemptioner or debtor. En. March 11, 1872.

Cal. Rep. Cit. 55, 535; 65, 361; 67, 339; 71, 596; 84, 93; 97, 295; 116, 230; 121, 596; 121, 598; 122, 513; 125, 89.

Prac. Act, sec. 236. En. April 29, 1851. Am'd. 1869-70, 106.

Cal. Rep. Cit. 7, 46; 13, 516; 18, 115; 25, 354; 31, 300; 37, 431; 38, 424.

§ 708. If purchaser of real property be evicted for irregularities in sale, what he may recover and from whom. When judgment to be revived. Petition for the purpose, how and by whom made. If the purchaser of real property sold on execution, or his successor in interest, be evicted therefrom in consequence of irregularities in the proceedings concerning the sale, or of the reversal or discharge of the judgment, he may recover the price paid, with interest, from the judgment creditor. If the purchaser of property at sheriff's sale, or his successor in interest, fail to recover possession in consequence of irregularity in the proceedings concerning the sale or because the property sold was not subject to execution and sale, the court having jurisdiction thereof must, after notice and on motion of such party in interest, or his attorney, revive the original judgment in the name of the petitioner, for the amount paid by such purchaser at the sale, with interest thereon from the time of payment, at the same rate that the original judgment bore; and the judgment so revived has the same force and effect as would an original judgment of the date of the revival, and no more. En. March 11, 1872.

Cal. Rep. Cit. 47, 603; 100, 102; 100, 104; 100, 105; 139, 7; 139, 8; 139, 9.

Prac. Act, sec. 237. En. April 29, 1851. Am'd. 1860, 303.

Cal. Rep. Cit. 47, 603.

§ 709. Party who pays more than his share may compel contribution. When property, liable to an execution against several persons, is sold thereon, and more than a due proportion of the judgment is satisfied out of the proceeds of the sale of the property or one of them, or one of them pays, without a sale, more than his proportion, he may compel contribution from the others; and when a judgment is against several, and is upon the obligation of one of them, as security for another, and the surety pays the amount, or any part thereof, either by sale of his property or before sale, he may compel repayment from the principal. In such case, the person so paying or contributing is entitled to the benefit of the judgment, to enforce contribution or repayment, if, within ten days after his payment, he file with the clerk of the court where the judgment was rendered, notice of his payment and claim to contribution or repayment. Upon a filing of such notice,

the clerk must make an entry thereof in the margin of the docket. En. March 11, 1872.

Cal. Rep. Cit. 59, 470; 67, 243; 75, 262; 96, 284; 96, 287; 127, 368; 135, 93.

§ 710. Judgments against officers, how enforced. The duly authenticated transcript of a judgment, for money, against a defendant, rendered by any court of this state may be filed with the controller of the state of California or the auditor of any county, city and county, city, or other municipal or public corporation, from which money is owing to the judgment debtor in such action (and in case there be no auditor then with the official whose duty corresponds to that of auditor) whereupon it shall be the duty of any such official, or of such public officer with whom such transcript shall have been filed, to draw his warrant in favor of or to pay into the court from the docket of which the transcript was taken, so much of the money, if sufficient there be, over which such state of California, county, city and county, city, or other municipal or public corporation of which he is an official, or over which said public officer has control and custody and which belongs to or is owing to the judgment debtor in the cause designated in said transcript as will cancel said judgment; the money so paid into court shall be a discharge pro tanto of any amount so due or owing to such judgment debtor. For filing such a transcript any such official or public officer may charge a fee of fifty cents. Upon the receipt by any court of money under the provisions of this act so much thereof as is not exempt from execution shall be paid to the judgment creditor, the balance to the judgment debtor. Such transcript when so filed, shall be accompanied by an affidavit on behalf of the person in whose interest the same is filed, stating the exact amount at the time due on such judgment, and that such person desires to avail himself of the provisions of this section. En. Stats. 1903, 362.

§ 710. Claimant of property may give bond and release property. Where property levied upon under execution to satisfy a judgment for the payment of money is claimed, in whole or in part, by a person, corporation, partnership or association, other than the judgment debtor, such claimant may give an undertaking as herein provided, which undertaking shall release the property in the undertaking

described from the lien and levy of such execution. En. Stats. 1903, 102.

Cal. Rep. Cit. 142, 192; 142, 195; 142, 198.

§ 710½. Claim of property, bond, amount of and conditions of. Such undertaking, with two sureties, shall be executed by the person, corporation, partnership or association, claiming in whole or in part, the property upon which execution is levied in double the estimated value of the property claimed by the person, corporation, partnership or association; provided, in no case need such undertaking be for a greater sum than double the amount for which the execution is levied; and where the estimated value of the property so claimed by the person, corporation, partnership or association is less than the sum for which such attachment is levied, such estimated value shall be stated in the undertaking, and said undertaking shall be conditioned that if the property claimed by the person, corporation, partnership or association is finally adjudged to be the property of the judgment debtor, said person, corporation, partnership or association will pay of said judgment upon which execution has issued a sum equal to the value, as estimated in said undertaking, of said property claimed by said person, corporation, partnership or association, and said property claimed shall be described in said undertaking. En. Stats. 1903, 102.

§ 711. Claim of property, bond, filing, and serving. Said undertaking shall be filed in the action in which said execution issued, and a copy thereof served upon the judgment creditor or his attorney in said action. En. Stats. 1903, 102.

§ 711½. Claim of property, bond, objections to. Within ten days after the service of the copy of undertaking, the judgment creditor may object to such undertaking on the ground of inability of the sureties, or either of them, to pay the sum for which they become bound in said undertaking, and upon the ground that the estimated value of property therein is less than the market value of the property claimed. Such objection to the undertaking shall be made in writing, specifying the ground or grounds of objection, and if the objection is made to the undertaking that the estimated value therein is less than the market

value of the property claimed. Such objection shall specify the judgment creditor's estimate of the market value of the property claimed. Such written objection shall be served upon the person, partnership, corporation or association giving such undertaking and claiming the property therein described. En. Stats. 1903, 102.

§ 712. **Claim of property, justification, approval and disapproval.** When the sureties, or either of them, are objected to, the surety or sureties so objected to shall justify before the court out of which such execution issued, upon ten days' notice of the time when they will so justify being given to the judgment debtor or his attorney. Upon the hearing and examination into the sufficiency of a surety, witnesses may be required to attend and evidence may be procured and introduced in the same manner as in trial of civil cases. Upon such hearing and examination, the court shall make its order, in writing, approving or disapproving the sufficiency of the surety or sureties on such undertaking. In case the court disapproves of the surety or sureties on any undertaking, a new undertaking may be filed and served, and to any undertaking given under the provisions of this act the same objection to the sureties may be made, and the same proceedings had as in case of the first undertaking filed and served. En. Stats. 1903, 102.

§ 712½. **Claim of property, bond, estimate of value and new bond.** When objection is made to the undertaking upon the ground that the estimated value of the property claimed, as stated in the undertaking, is less than the market value of the property claimed, the person, corporation, partnership or association may accept the estimated value stated by the judgment creditor in said objection, and a new undertaking may be at once filed with the judgment creditor's estimate stated therein as the estimated value, and no objection shall thereafter be made upon that ground; if the judgment creditor's estimate of the market value is not accepted, the person, corporation, partnership or association giving the undertaking shall move the court in which the execution issued, upon ten days' notice to the judgment creditor, to estimate the market value of the property claimed and described in the undertaking, and upon the hearing of such motion witnesses may be required to attend and testify, and evidence be produced in

the same manner as in the trial of civil actions. Upon the hearing of such motion, the court shall estimate the market value of the property described in the undertaking, and if the estimated value made by the court exceeds the estimated value as stated in the undertaking, a new undertaking shall be filed and served, with the market value determined by the court stated therein as the estimated value. En. Stats. 1903, 103.

§ 713. Claim of property, bond, justification of sureties. The sureties shall justify on the undertaking as required by section one thousand and fifty-seven of the Code of Civil Procedure. En. Stats. 1903, 103.

§ 713½. Claim of property, bond, when becomes effectual. The undertaking shall become effective for the purpose herein specified ten days after service of copy thereof on the judgment debtor, unless objection to such undertaking is made as herein provided, and in case objection is made to the undertaking filed and served, then the undertaking shall become effective for such purposes when an undertaking is given as herein provided. En. Stats. 1903, 103.

CHAPTER II.

PROCEEDINGS SUPPLEMENTARY TO THE EXECUTION.

- § 714. Debtor required to answer concerning his property, when.
- § 715. Proceedings to compel debtor to appear. In what cases he may be arrested. What bail may be given.
- § 716. Any debtor of the judgment debtor may pay the latter's creditor.
- § 717. Examination of debtors of judgment debtor, or of those having property belonging to him.
- § 718. Witnesses required to testify.
- § 719. Judge may order property to be applied on execution.
- § 720. Proceedings upon claim of another party to property, or on denial of indebtedness to judgment debtor.
- § 721. Disobedience of orders, how punished.

§ 714. Debtor required to answer concerning his property, when. When an execution against property of the judgment debtor, or of any one of several debtors in the same judgment, issued to the sheriff of the county where

he resides, or if he do not reside in this state, to the sheriff of the county where the judgment-roll is filed, is returned unsatisfied in whole or in part, the judgment creditor, at any time after such return is made, is entitled to an order from a judge of the court, requiring such judgment debtor to appear and answer concerning his property before such judge, or a referee appointed by him, at a time and place specified in the order, but no judgment debtor must be required to attend before a judge or referee out of the county in which he resides. En. March 11, 1872. Am'd. 1880, 5.

Cal. Rep. Cit. 47, 132; 57, 522; 64, 343; 68, 568; 72, 515; 99, 275; 133, 317; 144, 485.

Prac. Act, sec. 238. En. April 29, 1851.

Cal. Rep. Cit. 7, 201; 7, 202; 7, 204; 27, 320.

Conduct of examination: Ante, sec. 718.

Receiver, aiding proceedings: Ante, sec. 564, subd. 4.

§ 715. Proceedings to compel debtor to appear. In what cases he may be arrested. What bail may be given. After the issuing of an execution against property, and upon proof, by affidavit of a party or otherwise, to the satisfaction of a judge of the court, that any judgment debtor has property which he unjustly refuses to apply toward the satisfaction of the judgment, such judge may, by an order, require the judgment debtor to appear, at a specified time and place, before such judge, or a referee appointed by him to answer concerning the same; and such proceedings may thereupon be had for the application of the property of the judgment debtor toward the satisfaction of the judgment, as are provided upon the return of an execution. Instead of the order requiring the attendance of the judgment debtor, the judge may, upon affidavit of the judgment creditor, his agent, or attorney, if it appear to him that there is danger of the debtor absconding, order the sheriff to arrest the debtor, and bring him before such judge. Upon being brought before the judge, he may be ordered to enter into an undertaking, with sufficient surety, that he will attend from time to time before the judge or referee, as may be directed during the pendency of proceedings and until the final termination thereof, and will not in the meantime dispose of any portion of his property not exempt from execution. In default of entering into such

undertaking he may be committed to prison. En. March 11, 1872. Am'd. 1880, 5; 1880, 6.

Cal. Rep. Cit. 57, 522; 72, 514; 72, 515; 72, 516; 116, 374; 119, 382; 119, 439.

Prac. Act, sec. 239. En. April 29, 1851. Am'd. 1854, 63.

Cal. Rep. Cit. 7, 201; 7, 202; 7, 204.

Witnesses may be required to appear and answer: Post, sec. 718.

Application of property, of judgment debtor, to satisfaction of judgment: Post, sec. 719.

Arrest of debtor, as provisional remedy: Ante, secs. 478-504.

Discharge of persons imprisoned, on civil process: Post, secs. 1143-1154.

§ 716. Any debtor of the judgment debtor may pay the latter's creditor. After the issuing of an execution against property, and before its return, any person indebted to the judgment debtor may pay to the sheriff the amount on his debt, or so much thereof as may be necessary to satisfy the execution; and the sheriff's receipt is a sufficient discharge for the amount so paid. En. March 11, 1872.

Cal. Rep. Cit. 57, 522; 95, 336; 99, 274; 103, 659; 103, 660.

Prac. Act, sec. 240. En. April 29, 1851.

Cal. Rep. Cit. 7, 201; 22, 177; 33, 528; 33, 529.

Attachment: Compare sec. 544.

§ 717. Examination of debtors of judgment debtor, or of those having property belonging to him. After the issuing or return of an execution against property of the judgment debtor, or of any one of several debtors in the same judgment, or upon proof by affidavit or otherwise, to the satisfaction of the judge, that any person or corporation has property of such judgment debtor, or is indebted to him in an amount exceeding fifty dollars, the judge may, by an order, require such person or corporation, or any officer or member thereof, to appear at a specified time and place before him, or a referee appointed by him, and answer concerning the same. En. March 11, 1872.

§717
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Cal. Rep. Cit. 57, 522; 61, 435; 87, 182; 93, 648; 101, 325; 113, 431; 116, 374; 119, 382; 124, 564; 128, 168.

Prac. Act, sec. 241. En. April 29, 1851.

Cal. Rep. Cit. 7, 201; 7, 202; 9, 265; 26, 589; 38, 523.

Receiver: Ante, sec. 564.

Referee: Ante, sec. 714.

§ 718. **Witnesses required to testify.** Witnesses may be required to appear and testify before the judge or referee, upon any proceeding under this chapter in the same manner as upon the trial of an issue. En. March 11, 1872.

Cal. Rep. Cit. 57, 522; 87, 182; 113, 431.

Prac. Act, sec. 242. En. April 29, 1851.

Cal. Rep. Cit. 9, 265; 26, 589.

Witnesses, rights and duties of: 'Secs. 2064-2070.

§719
Am'd.
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§ 719. **Judge may order property to be applied on execution.** The judge or referee may order any property of a judgment debtor, not exempt from execution, in the hands of such debtor, or any other person, or due to the judgment debtor, to be applied toward the satisfaction of the judgment. En. March 11, 1872.

Cal. Rep. Cit. 47, 132; 56, 265; 57, 522; 87, 182; 113, 431; 119, 439; 124, 564.

Prac. Act, sec. 243. En. April 29, 1851.

Cal. Rep. Cit. 7, 202; 7, 204; 9, 265; 26, 589; 38, 524; 38, 525.

Exempt from execution, what is generally: Ante, sec. 690.
Wages, etc.: Sec. 1206.

§720
Am'd.
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§ 720. **Proceedings upon claim of another party to property, or on denial of indebtedness to judgment debtor.** If it appears that a person or corporation, alleged to have property of the judgment debtor, or to be indebted to him, claims an interest in the property adverse to him, or denies the debt, the court or judge may authorize by an order made to that effect, the judgment creditor to institute an action against such person or corporation for the recovery of such interest or debt; and the court or judge may, by order, forbid a transfer or other disposition of such interest or debt, until an action can be commenced and prosecuted to judgment. Such order may be modified or vacated by the judge granting the same, or the court in which the action is brought, at any time, upon such terms as may be just. En. March 11, 1872.

Cal. Rep. Cit. 51, 502; 56, 265; 56, 266; 57, 522; 61, 435; 64, 358; 86, 616; 87, 182; 90, 565; 95, 386; 95, 387; 101, 325; 103, 527; 108, 528; 109, 83; 109, 84; 109, 85; 113, 431; 116, 372.

Prac. Act, sec. 244. En. April 29, 1851.

Cal. Rep. Cit. 9, 266; 9, 266; 38, 524; 38, 525; 38, 526; 38, 527.

Receiver: Ante, sec. 564.

Wages, etc.: Sec. 1206.

§ 721. Disobedience of orders, how punished. If any person, party, or witness disobey an order of the referee, properly made in the proceedings before him, under this chapter, he may be punished by the court or judge ordering the reference, for a contempt. En. March 11, 1872.

Cal. Rep. Cit. 47, 132; 57, 522; 68, 568; 99, 274; 133, 317.

Prac. Act, sec. 245. En. April 29, 1851.

Contempt: Secs. 1209 et seq.

TITLE X.

ACTIONS IN PARTICULAR CASES.

- Chapter I. Actions for the Foreclosure of Mortgages,
§ § 726-729.
- II. Actions for Nuisance, Waste and Willful Trespass, in Certain Cases, on Real Property,
§ § 731-735.
- III. Actions to Determine Conflicting Claims to Real Property, and Other Provisions Relating to Actions Concerning Real Estate,
§ § 738-751.
- IV. Actions for the Partition of Real Property,
§ § 752-801.
- V. Actions for the Usurpation of an Office or Franchise, § § 802-810.
- VI. Of Actions Against Steamers, Vessels, and
VI Of Actions Against Steamers, Vessels, and Boats, § § 813-827.

CHAPTER I.

ACTIONS FOR THE FORECLOSURE OF MORTGAGES.

- § 726. Proceedings in foreclosure suits.
- § 727. Surplus money to be deposited in court.
- § 728. Proceedings when debt secured falls due at different times.
- § 729. Oath and undertaking of commissioner.

§ 726. Proceedings in foreclosure suits. There can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real or personal property, which action must be in accordance with the provisions of this chapter. In such action the court may, by its judgment, direct the sale of the encumbered property (or so much thereof as may be necessary), and the application of the proceeds of the sale to the payment of the costs of court, and the expenses of the sale, and the amount due plaintiff including, where the mortgage provides for the payment of attorney's fees, such sum for such fees as the court shall find reasonable,

not exceeding the amount named in the mortgage. The court may, by its judgment, or at any time after judgment, appoint a commissioner to sell the encumbered property. It must require of him an undertaking in an amount fixed by the court, with sufficient sureties, to be approved by the judge, to the effect that the commissioner will faithfully perform the duties of his office according to law. Before entering upon the discharge of his duties he must file such undertaking, so approved, together with his oath that he will faithfully perform the duties of his office. If it appear from the sheriff's return, or from the commissioner's report, that the proceeds are insufficient, and a balance still remains due, judgment must then be docketed by the clerk, in the manner provided in this code for such balance against the defendant or defendants personally liable for the debt, and it becomes a lien on the real estate of such judgment debtor, as in other cases in which execution may be issued. No person holding a conveyance from or under the mortgagor of the property mortgaged, or having a lien thereon, which conveyance or lien does not appear of record in the proper office at the time of the commencement of the action, need be made a party to such action, and the judgment therein rendered, and the proceedings therein had, are as conclusive against the party holding such unrecorded conveyance or lien as if he had been a party to the action. If the court appoints a commissioner for the sale of the property, he must sell it in the manner provided by law for the sale of like property by the sheriff upon execution; and the provisions of chapter one, title nine, part two, of this code are hereby made applicable to sales made by such commissioner, and the powers therein given and the duties therein imposed on sheriffs are extended to such commissioner. In all cases heretofore, now or hereafter pending in the courts of this state, in the event of the death, absence from the state, other disability or disqualification of the commissioner appointed to sell encumbered property under the foregoing provisions of this section, the court may, upon the happening of either the death, absence from the state, other disability or disqualification of the commissioner, appoint an elisor to perform the duties of such commissioner which are then to be performed in such action. The elisor so appointed shall give the undertaking, and take the oath hereinbefore provided to be given and taken by a commissioner, before entering upon the discharge of his duties, and shall thereafter perform all duties left unperformed by the commissioner whom he is ap-

pointed to succeed, with like effect as if such duties had been performed by the commissioner. If the land mortgaged consists of a single parcel, or of two or more contiguous parcels, situated in two or more counties, the court may, in its judgment, direct the whole thereof to be sold in one of such counties by the sheriff, commissioner or elisor, as the case may be, and upon such proceedings, and with like effect, as if the whole of the property were situated in that county. En. March 11, 1872. Am'd. 1893, 118; 1895, 99; 1900-01, 48.

Cal. Rep. Cit. 49, 679; 51, 242; 53, 39; 54, 614; 55, 20; 55, 533; 57, 10; 58, 58; 62, 630; 63, 367; 63, 560; 64, 232; 64, 362; 65, 513; 66, 98; 66, 335; 67, 236; 67, 584; 72, 260; 77, 59; 78, 200; 79, 121; 80, 248; 80, 353; 80, 355; 84, 156; 84, 157; 84, 158; 84, 176; 87, 161; 89, 487; 97, 289; 98, 493; 98, 494; 99, 418; 102, 268; 102, 269; 102, 271; 103, 643; 104, 271; 105, 417; 106, 196; 106, 197; 113, 466; 113, 467; 114, 128; 116, 119; 117, 342; 117, 482; 118, 98; 118, 335; 118, 336; 118, 341; 118, 420; 119, 22; 119, 291; 120, 497; 120, 498; 120, 499; 120, 500; 121, 33; 121, 34; 121, 197; 121, 198; 121, 296; 122, 36; 123, 215; 124, 166; 124, 417; 126, 109; 126, 286; 126, 586; 127, 30; 127, 475; 127, 477; 127, 616; 127, 620; 128, 491; 128, 492; 129, 163; 129, 164; 130, 514; 130, 515; 133, 61; 133, 684; 134, 446; 136, 535; 137, 203; 138, 71; 138, 260; 140, 81; 140, 194; 140, 380; 141, 385; 141, 656; 142, 473; 142, 476; 143, 77; 143, 475; 144, 66; 145, 550; 145, 551; 145, 553; 145, 554; 146, 7; 146, 10.

Prac. Act, sec. 246. En. April 29, 1851. Am'd. 1860, 303; 1861, 306; 1866, 704.

Cal. Rep. Cit. 9, 551; 22, 125; 25, 347; 25, 549; 26, 580; 27, 271; 28, 524; 28, 526; 30, 623; 33, 483; 38, 355; 39, 305; 49, 248; 50, 518; 52, 671.

Assistance, writ of: See sec. 1210.

Act authorizing court to fix fee on foreclosure: See post, Appendix, title Mortgages.

Injunction to restrain waste by party in possession: Post, sec. 745.

Judgment by default: Ante, sec. 585. Relief: Ante, secs. 580, 585.

Personal property, mortgage of—Remedies: See Civ. Code, secs. 2986-3011; post, sec. 2967.

Place of trial: Ante, sec. 392.

Pleading written document: Ante, secs. 447-449.

Foreclosure necessary to obtain possession: Post, sec. 744.

Receiver: Ante, sec. 564.

Lis pendens: Ante, sec. 409.

Several mortgages or debts, installments, etc.: Post, sec. 728.

Tender: Post, sec. 997.

§ 727. Surplus money to be deposited in court. If there be surplus money remaining after payment of the amount due on the mortgage, lien, or encumbrance with costs, the court may cause the same to be paid to the person entitled to it, and in the meantime may direct it to be deposited in court. En. March 11, 1872.

Cal. Rep. Cit. 73, 268; 104, 271.

Prac. Act, sec. 247. En. April 29, 1851.

Deposit in court: Ante, secs. 572, 573, 574; post, sec. 2104.

§ 728. Proceedings when debt secured falls due at different times. If the debt for which the mortgage, lien, or encumbrance is held, is not all due, so soon as sufficient of the property has been sold to pay the amount due, with costs, the sale must cease; and afterwards, as often as more becomes due, for principal or interest, the court may, on motion, order more to be sold. But if the property cannot be sold in portions, without injury to the parties, the whole may be ordered to be sold in the first instance, and the entire debt and costs paid, there being a rebate of interest where such rebate is proper. En. March 11, 1872.

Cal. Rep. Cit. 62, 502; 92, 675; 97, 289; 104, 271; 126, 287; 129, 186; 129, 187; 129, 188; 131, 189; 133, 256.

Prac. Act, sec. 248. En. April 29, 1851.

Cal. Rep. Cit. 33, 528; 45, 166; 129, 187.

§ 729. Oath and undertaking of commissioner. The commissioner, before entering upon his duties, must be sworn to perform them faithfully, and the court making the appointment shall require of him an undertaking, with sufficient sureties, to be approved by the court, in an amount to be fixed by the court, to the effect that he will faithfully perform the duties of commissioner, according to law. Within thirty days after such sale, the commissioner must file with the clerk of the court in which the action is pending a verified report and account

of the sale, together with the proper affidavits, showing that the regular and required notice of the time and place of the sale was given, which report and account shall have the same force and effect as the sheriff's return in sales under execution. In all cases of sales made by a commissioner, the court in which the proceedings are pending shall fix a reasonable compensation for the commissioner's services, but in no case to exceed the sum of ten dollars. En. Stats. 1893, 119.

Cal. Rep. Cit. 130, 629.

CHAPTER II.

ACTIONS FOR NUISANCE, WASTE, AND WILLFUL TRESPASS, IN CERTAIN CASES ON REAL PROPERTY.

§ 731. Nuisance defined, and actions for.

§ 732. Waste, actions for.

§ 733. Trespass for cutting or carrying away trees, etc., actions for.

§ 734. Measure of damages in certain cases under the last section.

§ 735. Damages in actions for forcible entry, etc., may be trebled.

§ 731. Nuisance defined, and actions for. An action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by a nuisance, as the same is defined in section thirty-four hundred and seventy-nine of the Civil Code, and by the judgment in such action the nuisance may be enjoined or abated as well as damages recovered therefor. A civil action may be brought in the name of the people of the State of California to abate a public nuisance, as the same is defined in section thirty-four hundred and eighty of the Civil Code, by the district attorney of any county in which such nuisance exists, or by the city attorney of any town or city in which such nuisance exists, and each of said officers shall have concurrent right to bring such action for a public nuisance existing within a town or city, and such district attorney, or city attorney, of any county or city in which such nuisance exists must bring such action whenever directed by the board of supervisors of such county or whenever directed by the legislative authority of such town or city. En. March 11, 1872. Am'd. 1905, 130.

Cal. Rep. Cit. 50, 594; 51, 144; 65, 455; 66, 151; 66, 174; 78, 464; 78, 616; 80, 343; 89, 29; 103, 238; 115, 463; 128, 496; 130, 379; 141, 363; 144, 545; 146, 57.

Prac. Act, sec. 249. En. April 29, 1851.

Cal. Rep. Cit. 29, 159; 30, 575; 50, 194; 50, 594.

Nuisance—Definition: Compare Civ. Code, secs. 3470, 3480, 3481; also, see Civ. Code, secs. 3482, 3483, 3490; damages: Civ. Code, sec. 3484.

Lapse of time cannot legalize public: Civ. Code, sec. 3490; private action for public nuisance: *Idem*, sec. 3493.

Common-law remedy: Ante, sec. 18.

Power of board of health to abate in San Francisco: See Pol. Code, sec. 3028.

§ 732. Waste, actions for. If a guardian, tenant for life or years, joint tenant, or tenant in common of real property, commit waste thereon, any person aggrieved by the waste may bring an action against him therefor, in which action there may be judgment for treble damages. En. March 11, 1872.

Cal. Rep. Cit. 64, 138; 64, 140; 136, 310; 140, 679; 140, 680; 142, 667.

Prac. Act, sec. 250. En. April 29, 1851.

Cal. Rep. Cit. 29, 513.

Waste: Ante, sec. 746; enjoining: Ante, sec. 745.

§ 733. Trespass for cutting or carrying away trees, etc., actions for. Any person who cuts down or carries off any wood or underwood, tree or timber, or girdles or otherwise injures any tree or timber on the land of another person, or on the street or highway in front of any person's house, village or city lot, or cultivated grounds; or on the commons or public grounds of any city or town, or on the street or highway in front thereof, without lawful authority, is liable to the owner of such land, or to such city or town, for treble the amount of damages which may be assessed therefor, in a civil action, in any court having jurisdiction. En. March 11, 1872.

Cal. Rep. Cit. 108, 201; 108, 205; 108, 206; 108, 207; 140, 680.

Prac. Act, sec. 251. En. April 29, 1851.

Cal. Rep. Cit. 51, 304; 51, 306; 108, 206.

Treble damages for injuries to trees: See Civ. Code, sec. 3346.

§ 734. Measure of damages in certain cases under the last section. Nothing in the last section authorizes the recovery of more than the just value of the timber taken from uncultivated woodland, for the repair of a public

highway or bridge upon the land, or adjoining it. En. March 11, 1872.

Prac. Act, sec. 252. En. April 29, 1851.

Cal. Rep. Cit. 1, 396; 1, 438.

§ 735. Damages in actions for forcible entry, etc., may be trebled. If a person recover damages for a forcible or unlawful entry in or upon, or detention of, any building, or any cultivated real property, judgment may be entered for three times the amount at which the actual damages are assessed. En. March 11, 1872.

Cal. Rep. Cit. 138, 283.

Prac. Act, sec. 253. En. April 29, 1851.

Forcible entry and unlawful detainer, treble damages: Post, sec. 1174.

Treble damages: See Civ. Code, sec. 3345.

CHAPTER III.

ACTIONS TO DETERMINE CONFLICTING CLAIMS TO REAL PROPERTY, AND OTHER PROVISIONS RELATING TO ACTIONS CONCERNING REAL ESTATE.

- § 738. Action to quiet title; trust under will; jury trial.
- § 739. When plaintiff cannot recover costs.
- § 740. If plaintiff's title terminates pending the suit, what he may recover, and how verdict and judgment to be.
- § 741. When value of improvements can be allowed as a setoff.
- § 742. An order may be made to allow a party to survey and measure the land in dispute.
- § 743. Order, what to contain, and how served. If unnecessary injury done, the party surveying to be liable therefor.
- § 744. A mortgage must not be deemed a conveyance, whatever its terms.
- § 745. When court may grant injunction; during foreclosure, after sale on execution, before conveyance.
- § 746. Damages may be recovered for injury to the possession after sale and before delivery of possession.
- § 747. Action not to be prejudiced by alienation, pending suit.
- § 748. Mining claims, actions concerning to be governed by local rules.
- § 749. How service may be made in action relating to real property.
- § 749. Determination of adverse claim of unknown owner.
- § 750. Notice to unknown owners, how served.
- § 751. Judgment to be in accordance with evidence.

§ 738. Action to quiet title; trust under will; jury trial. An action may be brought by any person against another who claims an estate or interest in real property, adverse to him, for the purpose of determining such adverse claim; provided, however, that whenever in an action to quiet title to, or to determine adverse claims to, real property,

the validity of any gift, devise, or trust, under any will, or instrument purporting to be a will, whether admitted to probate or not, shall be involved, such will, or instrument purporting to be a will, is admissible in evidence; and all questions concerning the validity of any gift, devise, or trust therein contained, save such as under the constitution belong exclusively to the probate jurisdiction, shall be finally determined in such action; and provided however, that nothing herein contained shall be construed to deprive a party of the right to a jury trial in any case where, by the law, such right is now given. En. March 11, 1872. Am'd. 1895, 73.

Cal. Rep. Cit. 52, 433; 53, 19; 53, 398; 53, 654; 56, 247; 65, 404; 65, 605; 66, 338; 66, 555; 66, 559; 66, 562; 66, 563; 66, 565; 67, 484; 69, 593; 71, 186; 71, 188; 73, 96; 73, 552; 74, 497; 74, 498; 74, 499; 75, 123; 77, 296; 77, 352; 79, 300; 79, 446; 80, 340; 80, 342; 80, 465; 81, 130; 83, 592; 83, 608; 83, 609; 83, 614; 84, 467; 86, 361; 86, 557; 86, 564; 86, 582; 87, 53; 88, 123; 88, 127; 89, 599; 90, 3; 90, 343; 92, 10; 92, 14; 94, 368; 94, 466; 94, 467; 98, 419; 103, 217; 108, 676; 109, 59; 111, 600; 116, 500; 117, 61; 120, 516; 122, 544; 125, 672; 126, 474; 127, 509; 127, 510; 129, 677; 132, 696; 132, 697; 134, 336; 135, 612; 136, 483; 137, 473; 138, 156; 147, 5.

Prac. Act, sec. 254. En. April 29, 1851.

Cal. Rep. Cit. 9, 271; 13, 114; 15, 262; 21, 243; 21, 510; 25, 44; 25, 252; 25, 437; 25, 518; 28, 202; 28, 647; 28, 649; 28, 655; 29, 57; 31, 287; 32, 110; 32, 628; 34, 371; 34, 559; 34, 565; 35, 34; 36, 314; 36, 321; 37, 307; 37, 440; 39, 17; 39, 19; 41, 62; 42, 644; 43, 215; 56, 248; 79, 446; 80, 465.

Determining claim to personalty: Post, sec. 1050.

Parties: Ante, secs. 379, 380, 381.

§ 739. When plaintiff cannot recover costs. If the defendant in such action disclaim in his answer any interest or estate in the property, or suffer judgment to be taken against him without answer, the plaintiff cannot recover costs. En. March 11, 1872.

Cal. Rep. Cit. 79, 447; 83, 598; 83, 609; 126, 143.

Prac. Act, sec. 255. En. April 29, 1851.

Costs: Post, secs. 1022 et seq.

§ 740. If plaintiff's title terminates pending the suit, what he may recover, and how verdict and judgment to be.

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In an action for the recovery of real property, where the plaintiff shows a right to recover at the time the action was commenced, but it appears that his right has terminated during the pendency of the action, the verdict and judgment must be according to the fact, and the plaintiff may recover damages for withholding the property. En. March 11, 1872.

Prac. Act, sec. 256. En. April 29, 1851.

Cal. Rep. Cit. 27, 246; 28, 448; 30, 473; 30, 475; 30, 476; 30, 477.

Pendency of action: Post, sec. 1049.

§ 741. When value of improvements can be allowed as a setoff. When damages are claimed for withholding the property recovered, upon which permanent improvements have been made by a defendant, or those under whom he claims, holding under color of title adversely to the claim of the plaintiff, in good faith, the value of such improvements must be allowed as a setoff against such damages. En. March 11, 1872.

Cal. Rep. Cit. 73, 175; 82, 127; 85, 401; 108, 210.

Prac. Act, sec. 257. En. April 29, 1851.

Cal. Rep. Cit. 14, 467; 18, 696; 31, 495; 35, 355.

Counterclaim.—Unless defendant sets it up, it is waived: Ante, sec. 439. Counterclaim generally: Ante, sec. 438.

§ 742. An order may be made to allow a party to survey and measure the land in dispute. The court in which an action is pending for the recovery of real property, or for damages for an injury thereto, or a judge thereof, may, on motion, upon notice by either party, for good cause shown, grant an order allowing to such party the right to enter upon the property and make survey and measurement thereof, and of any tunnels, shafts, or drifts therein, for the purpose of the action, even though entry for such purpose has to be made through other lands belonging to parties to the action. En. March 11, 1872. Am'd. 1880, 11.

Prac. Act, sec. 258. En. April 29, 1851. Am'd. 1860, 304.

Order for survey where title to land in two counties disputed: See Pol. Code, sec. 4270.

§ 743. Order, what to contain, and how served. If unnecessary injury done, the party surveying to be liable therefor. The order must describe the property, and a copy thereof must be served on the owner or occupant; and thereupon such party may enter upon the property, with necessary surveyors and assistants, and make such survey and measurement; but if any necessary injury be done to the property, he is liable therefor. En. March 11, 1872.

Prac. Act, sec. 259. En. April 29, 1851.

§ 744. A mortgage must not be deemed a conveyance, whatever its terms. A mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale. En. March 11, 1872.

Cal. Rep. Cit. 57, 482; 57, 483; 62, 630; 66, 615; 76, 180; 98, 494; 100, 254; 120, 179.

Prac. Act, sec. 260. En. April 29, 1851.

Cal. Rep. Cit. 14, 264; 17, 591; 17, 592; 22, 261; 29, 19; 29, 255; 36, 48; 36, 51; 36, 59; 36, 63; 76, 180; 144, 32; 144, 33.

Conveyance deemed mortgage: Civ. Code, secs. 2924, 2925; proof: Civ. Code, sec. 2925; mortgagee's possession: Civ. Code, sec. 2927.

§ 745. When court may grant injunction; during foreclosure, after sale on execution, before conveyance. The court may by injunction, on good cause shown, restrain the party in possession from doing any act to the injury of real property during the foreclosure of a mortgage thereon; or, after a sale on execution, before a conveyance. En. March 11, 1872.

Prac. Act, sec. 261. En. April 29, 1851.

Cal. Rep. Cit. 80, 497.

Injunction, generally: Ante, secs. 525-533.

Receiver: Ante, sec. 564, subd. 2.

Waste: Civ. Code, sec. 2929.

Foreclosure of mortgage: Ante, sec. 726.

Execution sales: Ante, secs. 694 et seq.

§746. Damages may be recovered for injury to the possession after sale and before delivery of possession.

When real property has been sold on execution, the purchaser thereof, or any person who may have succeeded to his interest, may, after his estate becomes absolute, recover damages for injury to the property by the tenant in possession after sale and before possession is delivered under the conveyance. En. March 11, 1872.

Prac. Act, sec 262. En. April 29, 1851.

Lis pendens: Ante, sec. 409.

§ 747. Action not to be prejudiced by alienation, pending suit. An action for the recovery of real property against a person in possession cannot be prejudiced by any alienation made by such person, either before or after the commencement of the action. En. March 11, 1872.

Prac. Act, sec. 263. En. April 29, 1851.

Cal. Rep. Cit. 71, 476.

§ 748. Mining claims, actions concerning to be governed by local rules. In actions respecting mining claims, proof must be admitted of the customs, usages, or regulations established and in force at the bar or diggings embracing such claim; and such customs, usages, or regulations, when not in conflict with the laws of this state, must govern the decision of the action. En. March 11, 1872.

Prac. Act, sec. 621. En. April 29, 1851.

Cal. Rep. Cit. 5, 100; 26, 272; 26, 533; 31, 393; 69, 383.

§ 749. How service may be made in action relating to real property. Service may be made by publication in actions relating to or the subject of which is real property in this state, when any defendant has or claims any adverse interest or estate therein, and where the person on whom the service is to be made resides outside of the state, or cannot, after due diligence, be found within the state, or conceals himself to avoid the service of summons, or is a foreign corporation having no managing or business agent, cashier, or secretary within the state, and the fact appearing, by affidavit, to the satisfaction of the court or judge thereof, and it also appearing by such affidavit or by the verified complaint on file that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a necessary or proper party to the action, such judge may make an order that the service

be made by publication of summons. Service by publication and proof of service of a copy of the summons and complaint in actions under this title shall be sufficient, if made in accordance with sections four hundred and thirteen and four hundred and fifteen of this code. En. Stats. 1891, 278.

This section was not superseded by the next section 749, adopted in 1901 and amended in 1903 under the principle of *Ex parte Ruffin*, 119 Cal. 487.

§ 749. **Determination of adverse claim of known and unknown owner.** An action may be brought to determine the adverse claims to and clouds upon title to real property by a person who, by himself or by himself and his predecessors in interest, has been in the actual, exclusive and adverse possession of such property continuously for twenty years prior to the filing of the complaint, claiming to own the same in fee against the whole world, and who has paid all taxes of every kind levied or assessed against the property during the period of five years continuously next preceding the filing of the complaint. Said action shall be commenced by the filing of a verified complaint averring the matters above enumerated. The said complaint may include as defendants in such action, in addition to such persons as appear of record to have, all other persons who are known to the plaintiff to have, some claim or cloud on the lands described in the complaint adverse to plaintiff's ownership, or other persons unknown claiming any right, interest or lien in such lands, or cloud upon the title of plaintiff thereto, and the plaintiff may describe such unknown defendants in the complaint as follows: "also all other persons unknown, claiming any right, title, estate, lien or interest in the real property described in the complaint adverse to plaintiff's ownership, or any cloud upon plaintiff's title thereto." Within ten days after the filing of the complaint, plaintiff shall file, or cause to be filed, in the office of the county recorder of the county where the property is situated, a notice of the pendency of the action, containing the matters required by section four hundred and nine of this code. En. Stats. 1900-01, 579. Am'd. 1903, 104.

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Cal. Rep. Cit. 115, 276.

See sec. 412, ante.

§ 750. Notice to unknown owners, how served. Within one year after the filing of the complaint, as required by the preceding section, a summons must be issued, which shall contain the matters required by section four hundred and seven of this code, and in addition a description of the property and a statement of the object of the action. In said summons the said unknown defendants shall be designated as in the complaint. Within thirty days after the issuance of the summons, the plaintiff shall post or cause to be posted a copy thereof in a conspicuous place on the property. All defendants residing in the state of California, whose place of residence is known to the plaintiff shall be served personally. After service on all such defendants has been made, the plaintiff, or his agent, or attorney, shall make and file an affidavit wherein there shall be stated the names of the defendants who have been served personally, the names of the defendants who reside out of the state and their places of residence, if known to the plaintiff, and the names of the defendants residing in or out of the state whose place of residence is unknown to the plaintiff, and thereupon the court or a judge thereof shall make an order directing the said summons to be served upon the defendants residing out of the state, whose place of residence is known to the plaintiff and upon the defendants residing in or out of the state, whose place of residence is unknown to the plaintiff, and upon all the unknown defendants as stated in the complaint and summons, by publication in some newspaper of general circulation printed and published in the county where the property is situated, and if there be no such paper in such county, then in some adjoining county, to be designated by the court or judge thereof, which publication shall be for once a week for two successive months. A copy of the summons and complaint, within ten days after the making of said order, properly addressed and with the postage thereon fully prepaid, shall be mailed to each of the defendants who reside out of the state, at their place of residence, if known, and also to the defendants residing in or out of the state whose place of residence is unknown to plaintiff, addressed to them at the county seat of the county where the action is commenced. All such unknown persons so served shall have the same rights as are provided by law in cases of all other defendants named, upon whom service is made by publication, or personally, and the action shall proceed against such unknown persons in the same manner as against the defendants who are named

upon whom service is made by publication or personally and with like effect; and any such unknown person who has or claims to have any right, title, estate, lien or interest in the said property, or cloud on the title thereto, adverse to plaintiff, at the time of the commencement of the action, who has been duly served as aforesaid, and anyone claiming under him, shall be concluded by the judgment in such action as effectually as if the action was brought against the said person by his or her name and personal service of process was obtained, notwithstanding any such unknown person may be under legal disability. Service shall be deemed complete upon the completion of the publication. En. Stats. 1900-01, 579. Am'd. 1903, 104.

§ 751. Judgment to be in accordance with evidence. When the summons has been served as provided in the preceding section and the time for answering has expired, the court shall proceed to hear the case as in other cases and shall have jurisdiction to examine into and determine the legality of plaintiff's title and of the title and claim of all the defendants and of all unknown persons, and to that end must not enter any judgment by default, but must in all cases require evidence of plaintiff's title and possession and hear such evidence as may be offered respecting the claims and title of any of the defendants and must thereafter direct judgment to be entered in accordance with the evidence and the law. The court before proceeding to hear the case must require proof to be made that the summons has been served and posted as hereinbefore directed and that the required notice of pendency of action has been filed. The judgment after it has become final is conclusive against all the persons named in the summons and complaint who have been served and against all unknown persons as stated in the complaint and summons who have been served by publication, but shall not be conclusive against the state of California or the United States. Said judgment shall have the effect of a judgment in rem except as against the state of California and the United States; and provided further, that the said judgment shall not bind or be conclusive against any person claiming any estate, title, right, possession or lien to the property under the plaintiff or his predecessors in interest, which claim, lien, estate or right of possession has arisen or been created by the plaintiff or his predecessors in interest within twenty years prior to the filing of the com-

plaint. The remedy provided in this and the two preceding sections shall be construed as cumulative and not exclusive of any other remedy, form or right of action or proceeding now allowed by law. En. Stats. 1900-01, 579. Am'd. 1903, 106.

Decrees affecting realty to be recorded: See Pol. Code, sec. 4238.

CHAPTER IV.

ACTIONS FOR THE PARTITION OF REAL PROPERTY.

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Gen. Cit. to Chap.—Cal. Rep. Cit. 64, 629; 91, 410.

§ 752. Who may bring actions for partition. When several cotenants hold and are in possession of real property as parceners, joint tenants, or tenants in common, in which one or more of them have an estate of inheritance, or for life or lives, or for years, an action may be brought by one or more of such persons for a partition thereof according to the respective rights of the persons interested therein, and for a sale of such property, or a part thereof, if it appear that a partition cannot be made without great prejudice to the owners. En. March 11, 1872.

Cal. Rep. Cit. 53, 25; 58, 592; 64, 614; 65, 47; 84, 418; 86, 526; 86, 530; 106, 686; 126, 483; 141, 385; 144, 29; 145, 164.

Prac. Act, sec. 264. En. April 29, 1851. Am'd. 1854, 63; 1866, 704.

Cal. Rep. Cit. 26, 78; 27, 331; 35, 586.

Partition of dominant tenements, easements: Civ. Code, sec. 807.

Intervention: Ante, sec. 387.

§ 753. Interests of all parties must be set forth in the complaint. The interests of all persons in the property, whether such persons be known or unknown, must be set forth in the complaint specifically and particularly, as far as known to the plaintiff; and if one or more of the parties, or the share or quantity of interest of any of the parties, be unknown to the plaintiff, or be uncertain or contingent, or the ownership of the inheritance depend upon an executory devise, or the remainder be a contingent remainder, so that such parties cannot be named, that fact must be set forth in the complaint. En. March 11, 1872.

Cal. Rep. Cit. 48, 394; 64, 614; 130, 501; 137, 426; 139, 172; 144, 29.

Prac. Act, sec. 265. En. April 29, 1851.

Cal. Rep. Cit. 27, 331; 27, 336; 32, 294; 32, 295.

Complaint in partition—Complaint generally: Ante, sec. 426; parties: Post, sec. 754; ante, secs. 384, 387.

Unknown persons, use of fictitious names: Ante, sec. 474; and as to summons: Post, sec. 756.

Abstract of title—Procured before suit: Post, sec. 799.

§ 754. Lienholders not of record need not be made parties. No person having a conveyance of or claiming a lien on the property, or some part of it, need be made a party to the action unless such conveyance or lien appear of record. En. March 11, 1872.

Cal. Rep. Cit. 53, 39.

Prac. Act, sec. 266. En. April 29, 1851. Am'd. 1866, 704.

§ 755. Plaintiff must file notice of *lis pendens*. Immediately after filing the complaint in the superior court, the plaintiff must record in the office of the recorder of the county or of the several counties in which the property is situated, a notice of the pendency of the action, containing the names of the parties so far as known, the object of the action, and a description of the property to be affected thereby. From the time of filing such notice for record, all persons shall be deemed to have notice of the pendency of the action. En. March 11, 1872. Am'd. 1873-4, 325; 1880, 11.

Cal. Rep. Cit. 106, 683.

Prac. Act, sec. 267. En. April 29, 1851. Am'd. 1866, 705.

Lis pendens: Sec. 409.

§ 756. Summons must be directed to all persons interested in the property. The summons must be directed to all the joint tenants and tenants in common, and all persons having any interest in, or any liens of record by mortgage, judgment, or otherwise, upon the property, or upon any particular portion thereof; and generally, to all persons unknown who have or claim any interest in the property. En. March 11, 1872.

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Cal. Rep. Cit. 53, 371; 58, 594.

Prac. Act, sec. 268. En. April 29, 1851.

Cal. Rep. Cit. 35, 592.

Summons in partition, generally: Ante, secs. 405-416; and as to contents: See ante, sec. 407.

§ 757. Unknown parties may be served by publication. If a partion having a share or interest is unknown, or any one of the known parties reside out of the state, or cannot be found therein, and such fact is made to appear by affidavit, the summons may be served on such absent or unknown party by publication, as in other cases. When publication is made, the summons, as published, must be accompanied by a brief description of the property which is the subject of the action. En. March 11, 1872.

Prac. Act, sec. 269. En. April 29, 1851.

Service by publication: Ante, secs. 412, 413.

§ 758. Answer of defendants, what to contain. The defendants who have been personally served with the summons and a copy of the complaint, or who have appeared without such service, must set forth in their answers, fully and particularly, the origin, nature, and extent of their respective interests in the property; and if such defendants claim a lien on the property by mortgage, judgment, or otherwise, they must state the original amount and date of the same, and the sum remaining due thereon; also whether the same has been secured in any other way or not; and, if secured, the nature and extent of such security, or they are deemed to have waived their right to such lien. En. March 11, 1872.

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Cal. Rep. Cit. 53, 371; 58, 595; 117, 675; 144, 761.

Prac. Act, sec. 270. En. April 29, 1851. Am'd. 1866, 705.

Cal. Rep. Cit. 1, 199; 32, 295.

Answer in partition—Pleading disbursements: Post, sec. 798; answer generally: Ante, sec. 437.

Notice, as to abstract of title: Post, sec. 799.

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§ 759. The rights of all parties may be ascertained in the action. The rights of the several parties, plaintiff as well as defendant, may be put in issue, tried, and determined in such action; and when a sale of the premises is necessary, the title must be ascertained by proof to the satisfaction of the court, before the judgment of sale can be made; and where service of the complaint has been made by publication, like proof must be required of the right of the absent or unknown parties, before such judgment is rendered; except that where there are several unknown persons having an interest in the property, their rights may be considered together in the action, and not as between themselves. En. March 11, 1872.

Cal. Rep. Cit. 58, 593; 64, 609; 64, 612; 64, 614; 64, 618; 64, 629; 116, 433; 144, 29; 144, 761.

Prac. Act, sec. 271. En. April 29, 1851.

Cal. Rep. Cit. 1, 183; 2, 161; 27, 335; 32, 294; 58, 593.

Final judgment: Post, sec. 766.

Parties: Ante, secs. 381, 384; post, sec. 761.

Intervention: Ante, sec. 387.

§ 760. Partial partition. Whenever from any cause it is, in the opinion of the court, impracticable or highly inconvenient to make a complete partition, in the first instance, among all the parties in interest, the court may first ascertain and determine the shares or interest respectively held by the original cotenants, and thereupon adjudge and cause a partition to be made, as if such original cotenants were the parties and sole parties in interest, and the only parties to the action, and thereafter may proceed in like manner to adjudge and make partition separately of each share or portion so ascertained and allotted, as between those claiming under the original tenant to whom the same shall have been so set apart, or may allow them to remain tenants in common thereof, as they may desire. En. March 11, 1872.

Cal. Rep. Cit. 64, 609; 64, 610; 64, 612; 64, 627; 64, 630; 64, 631; 64, 632; 80, 497; 90, 482.

Prac. Act, sec. 272. En. April 29, 1851. Rep. 1862, 88. En. 1866, 705.

Cal. Rep. Cit. 1, 182; 36, 115.

§ 761. Lienholders must be made parties, or a referee be appointed to ascertain their rights. If it appears to the court, by the certificate of the county recorder or county clerk, or by the sworn or verified statement of any person who may have examined or searched the records, that there are outstanding liens or encumbrances of record upon such real property, or any part or portion thereof, which existed and were of record at the time of the commencement of the action, and the persons holding such liens are not made parties to the action, the court must either order such persons to be made parties to the action, by an amendment or supplemental complaint, or appoint a referee to ascertain whether or not such lien or encumbrances have been paid, or if not paid, what amount remains due thereon, and their order among the liens or encumbrances severally held by such persons and the parties to the action, and whether the amount remaining due thereon has been secured in any manner, and if secured, the nature and extent of the security. En. March 11, 1872.

§761
Am'd.
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Cal. Rep. Cit. 64, 612; 79, 443; 80, 500.

Prac. Act, sec. 273. En. April 29, 1851. Am'd. 1862, 88.

Cal. Rep. Cit. 80, 497.

§ 762. Lienholders must be notified to appear before the referee appointed. The plaintiff must cause a notice to be served, a reasonable time previous to the day for appearance before the referee appointed as provided in the last section, on each person having outstanding liens of record, who is not a party to the action, to appear before the referee at a specified time and place, to make proof, by his own affidavit or otherwise, of the amount due or to become due contingently or absolutely thereon. In case such person be absent, or his residence be unknown, service may be made by publication, or notice to his agents, under the direction of the court, in such manner as may be proper. The report of the referee thereon must be made to the court, and must be confirmed, modified, or set aside, and a new reference ordered, as the justice of the case may require. En. March 11, 1872.

Cal. Rep. Cit. 64, 612; 80, 500.

Prac. Act, sec. 274. En. April 29, 1851.

§763 Am'd. p. 461 § 763. The court may order a sale or partition, and appoint referees therefor. If it be alleged in the complaint and established by evidence, or if it appear by the evidence without such allegation in the complaint to the satisfaction of the court, that the property or any part of it is so situated that partition cannot be made without great prejudice to the owners, the court may order a sale thereof, otherwise, upon the requisite proofs being made, it must order a partition according to the respective rights of the parties as ascertained by the court, and appoint three referees therefor, and must designate the portion to remain undivided for the owners whose interests remain unknown, or are not ascertained; provided, that when the site of an incorporate city or town is included within the exterior boundaries of the property to be partitioned, then, on said fact being established by evidence, the following proceedings shall be had. The court shall thereupon direct the referees to survey and appraise the entire property to be partitioned by actual lots and subdivisions then existing in the actual possession of the several tenants in common, exclusive of the value of improvements thereon, first setting apart necessary portions of the property for ways, roads, and streets, as in section seven hundred and sixty-four of this code provided, and to report such survey and separate appraisement on each lot and subdivision to the court. The court may confirm, change, modify, or set aside the report in whole or in part, and if necessary appoint new referees. When, after the final confirmation of the report of such survey and appraisement, it shall appear by evidence to the satisfaction of the court that an equitable partition of the whole property is impracticable, and a sale of the site of such city or town, or any portion thereof, will be for the best interests of the owners of the whole property, it shall order a sale thereof; provided, that within sixty days thereafter any tenant in common, or tenants in common, having improvements erected on any town or city lot or subdivision included in such order of sale, shall have the prior right to purchase the same at such appraised valuation, and may pay into court the amount so appraised as the value thereof, and upon such payment the

title shall vest in such purchaser or purchasers, and the court shall cause to be executed by said referees a deed for such lot or subdivision in fee and in severalty to such purchaser or purchasers, such further proceedings shall then be had as to the remainder of the property, and the money so paid to the court, as by this chapter provided. If, during the pendency of the action, any of the parties die, or become insane or otherwise incompetent, the proceedings shall not for that cause be delayed or suspended, but the attorney who has appeared for such party may continue to represent such interest; and in case any such party has not appeared by an attorney, the court shall appoint an attorney to represent the interest which was held by such party, until his heirs or legal representatives, or successors in interest, shall have appeared in the action; and an attorney so appointed shall be allowed by the court a reasonable compensation for his services, which may be taxed as costs against the share or interest represented by such attorney, and may be adjudged a lien thereon, in the discretion of the court. En. March 11, 1872. Am'd. 1880, 60.

Cal. Rep. Cit. 59, 532; 64, 609; 64, 614; 64, 618; 64, 629; 67, 201; 80, 501; 84, 418; 90, 455; 117, 680; 130, 182; 137, 56.

Prac. Act, sec. 275. En. April 29, 1851.

Sale, proceedings on: Post, secs. 770-795.

Partition of the dominant tenement, burden must be apportioned: Civ. Code, sec. 807.

Referees: Post, sec. 797.

Modifying decree: Post, sec. 766.

§ 764. Partition must be made according to the rights of the parties, as determined by the court. In making partition, the referees must divide the property, and allot the several portions thereof to the respective parties, quality and quantity relatively considered, according to the respective rights of the parties as determined by the court, pursuant to the provisions of this chapter, designating the several portions by proper landmarks, and may

employ a surveyor with the necessary assistants to aid them. Before making partition or sale, the referees may, whenever it will be for the advantage of those interested, set apart a portion of the property for a way, road, or street, and the portion so set apart shall not be assigned to any of the parties or sold, but shall remain an open and public way, road, or street, unless the referees shall set the same apart as a private way for the use of the parties interested, or some of them, their heirs and assigns, in which case it shall remain such private way. Whenever the referees have laid out on any tract of land roads sufficient in the judgment of said referees to accommodate the public and private wants, they shall report that fact to the court, and upon the confirmation of their report all other roads on said tract shall cease to be public highways. Whenever it shall appear, in an action for partition of lands, that one or more of the tenants in common, being the owner of an undivided interest in the tract of land sought to be partitioned, has sold to another person a specific tract by metes and bounds out of the common land, and executed to the purchaser a deed of conveyance, purporting to convey the whole title to such specific tract to the purchaser in fee and in severalty, the land described in such deed shall be allotted and set apart in partition to such purchaser, his heirs or assigns; or in such other manner as shall make such deed effectual as a conveyance of the whole title to such segregated parcel, if such tract or tracts of land can be so allotted or set apart without material injury of the rights and interests of the other cotenants who may not have joined in such conveyance; provided, that in all cases the court shall direct the referees, in making partition of land, to allot the share of each of the parties owning an interest in the whole or in any part of the premises sought to be partitioned, and to locate the share of each cotenant, so as to embrace as far as practicable the improvements made by such cotenant upon the property; and the value of the improvements made by the tenants in common must be excluded from the valuation in making allotments, and the land must be valued without regard to such improvement, in case the same can be done without material injury to the rights and interest to [of] the other tenants in common owning such land. En. March 11, 1872. Am'd. 1873-4, 325; 1875-6, 36.

Cal. Rep. Cit. 64, 609; 64, 614; 64, 618; 65, 48; 80, 501; 84, 5; 90, 453; 90, 454; 90, 455; 90, 456; 90, 460; 90, 468; 90, 476; 101, 530; 108, 270.

Prac. Act, sec. 276. En. April 29, 1851. Am'd. 1866, 705.

§ 765. Referees must make a report of their proceedings. The referees must make a report of their proceedings, specifying therein the manner in which they executed their trust, and describing the property divided, and the shares allotted to each party, with a particular description of each share. En. March 11, 1872.

Cal. Rep. Cit. 64, 615; 64, 629; 90, 455; 97, 27.

Prac. Act, sec. 277. En. April 29, 1851.

Cal. Rep. Cit. 1, 333; 1, 334.

§ 766. The court may set aside or affirm report, and enter judgment thereon. Upon whom judgment to be conclusive. The court may confirm, change, modify, or set aside the report, and if necessary, appoint new referees. Upon the report being confirmed, judgment must be rendered that such partition be effectual forever, which judgment is binding and conclusive:

1. On all persons named as parties to the action, and their legal representatives, who have at the time any interest in the property divided, or any part thereof, as owners in fee or as tenants for life or for years, or as entitled to the reversion, remainder, or the inheritance of such property, or any part thereof, after the determination of a particular estate therein, and who by any contingency may be entitled to a beneficial interest in the property, or who have an interest in any undivided share thereof, as tenants for years or for life.

2. On all persons interested in the property, who may be unknown, to whom notice has been given of the action for partition by publication;

3. On all other persons claiming from such parties or persons, or either of them.

And no judgment is invalidated by reason of the death of any party before final judgment or decree; but such judgment or decree is as conclusive against the heirs, legal representatives, or assigns of such decedent, as if it had been entered before his death. En. March 11, 1872.

Cal. Rep. Cit. 58, 163; 64, 615; 80, 501; 84, 514; 97, 27; 137, 59. Subd. 1—144, 761.

Prac. Act, sec. 278. En. April 29, 1851. Am'd. 1866, 705, 1867-8, 629.

Cal. Rep. Cit. 32, 296; 35, 592.

Decrees partitioning realty to be recorded: See Pol. Code, sec. 4238.

Record of decree as notice: See Pol. Code, sec. 4239.

§ 767. Judgment not to affect tenants for years to the whole property. The judgment does not affect tenants for years less than ten, to the whole of the property which is the subject of the partition. En. March 11, 1872.

Prac. Act, sec. 279. En. April 29, 1851.

Cal. Rep. Cit. 1, 97; 1, 177.

§ 768. Expenses of partition must be apportioned among the parties. The expenses of the referees, including those of a surveyor and his assistants, when employed, must be ascertained and allowed by the court, and the amount thereof, together with the fees allowed by the court, in its discretion, to the referees, must be apportioned among the different parties to the action, equitably. En. March 11, 1872.

Cal. Rep. Cit. 140, 404; 140, 405.

Prac. Act, sec. 280. En. April 29, 1851. Am'd. 1866, 706; 1871-2, 230.

Cal. Rep. Cit. 1, 194; 81, 467; 140, 404; 140, 405.

Section 280 of the old Practice Act, which came to be section 768 of the Code of Civil Procedure, was amended during the session of 1871-72, and amendments of that session superseded the codes, as follows:

The expenses of the referees, including those of a surveyor and his assistant when employed, shall be ascertained and allowed by the court, and the amount thereof, together with the fees allowed by law to the referees, and such attorney's fees expended for the common benefit, both for plaintiff and defendants, as the court shall deem just and proper, shall be apportioned among the different parties to the action.

Fees of referees: See sec. 1028.

§ 769. A lien on an undivided interest of any party is a charge only on the share assigned to such party. When a lien is on an undivided interest or estate of any of the

parties, such lien, if a partition be made, shall thenceforth be a charge only on the share assigned to such party; but such share must first be charged with its just proportion of the costs of the partition, in preference to such lien. En. March 11, 1872.

Prac. Act, sec. 281. En. April 29, 1851.

§ 770. Estate for life or years may be set off in a part of the property not sold, when not all sold. When a part of the property only is ordered to be sold, if there be an estate for life or years, in an undivided share of the whole property, such estate may be set off in any part of the property not ordered to be sold. En. March 11, 1872.

Cal. Rep. Cit. 103, 454.

Prac. Act, sec. 282. En. April 29, 1851.

§ 771. Application of proceeds of sale of encumbered property. The proceeds of the sale of encumbered property must be applied under the direction of the court, as follows:

1. To pay its just proportion of the general costs of the action;

2. To pay the costs of the reference;

3. To satisfy and cancel of record the several liens in their order of priority, by payment of the sums due and to become due; the amount due to be verified by affidavit at the time of payment;

4. The residue among the owners of the property sold, according to their respective shares therein. En. March 11, 1872.

Prac. Act, sec. 283. En. April 29, 1851.

§ 772. Party holding other securities may be required first to exhaust them. Whenever any party to an action who holds a lien upon the property, or any part thereof, has other securities for the payment of the amount of such lien, the court may, in its discretion, order such securities to be exhausted before a distribution of the proceeds of sale, or may order a just deduction to be made from the amount of the lien on the property, on account thereof. En. March 11, 1872.

Prac. Act, sec. 284. En. April 29, 1851.

§ 773. **Proceeds of sale, disposition of.** The proceeds of sale and the securities taken by the referees, or any part thereof, must be distributed by them to the persons entitled thereto, whenever the court so directs. But in case no direction be given, all of such proceeds and securities must be paid into court, or deposited therein, or as directed by the court. En. March 11, 1872.

Cal. Rep. Cit. 111, 214.

Prac. Act, sec. 285. En. April 29, 1851.

Deposit in court: Ante, secs. 572-574; post, sec. 2104.

§774
Am'd.
p. 464

§ 774. **When paid into court, the cause may be continued for the determination of the claims of the parties.** When the proceeds of the sale of any share or parcel belonging to persons who are parties to the action, and who are known, are paid into court, the action may be continued as between such parties, for the determination of their respective claims thereto, which must be ascertained and adjudged by the court. Further testimony may be taken in court, or by a referee, at the discretion of the court, and the court may, if necessary, require such parties to present the facts or law in controversy, by pleadings, as in an original action. En. March 11, 1872.

Cal. Rep. Cit. 116, 433.

Prac. Act, sec. 286. En. April 29, 1851.

§775
Am'd.
p. 464

§ 775. **Sales by referees must be at public auction.** All sales of real property, made by referees under this chapter, must be made at public auction to the highest bidder, upon notice published in the manner required for the sale of real property on execution. The notice must state the terms of sale, and if the property or any part of it is to be sold subject to a prior estate, charge, or lien, that must be stated in the notice. En. March 11, 1872.

Prac. Act, sec. 287. En. March 29, 1851.

Terms, distinct lots: Post, sec. 782.

Notice of execution sales: Ante, secs. 692, 693; proceedings: Ante, secs. 694 et seq.

§ 776. **The court must direct the terms of sale or credit.** The court must, in the order for sale, direct the terms of credit which may be allowed for the purchase money of

any portion of the premises of which it may direct a sale on credit, and for that portion of which the purchase money is required, by the provisions hereinafter contained, to be invested for the benefit of unknown owners, infants, or parties out of the state. En. March 11, 1872.

Cal. Rep. Cit. 119, 71.

Prac. Act, sec. 288. En. April 29, 1851.

§ 777. Referees may take securities for purchase money. The referees may take separate mortgages and other securities for the whole, or convenient portions of the purchase money, of such parts of the property as are directed by the court to be sold on credit, for the shares of any known owner of full age, in the name of such owner; and for the shares of an infant, in the name of the guardian of such infant; and for other shares, in the name of the clerk of the county and his successors in office. En. March 11, 1872.

Prac. Act, sec. 289. En. April 29, 1851. Am'd. 1854, 64.

Cal. Rep. Cit. 27, 401.

§ 778. Tenants whose estate has been sold shall receive compensation. The person entitled to a tenancy for life, or years, whose estate has been sold, is entitled to receive such sum as may be deemed a reasonable satisfaction for such estate, and which the person so entitled may consent to accept instead thereof, by an instrument in writing, filed with the clerk of the court. Upon the filing of such consent, the clerk must enter the same in the minutes of the court. En. March 11, 1872.

Prac. Act, sec. 290. En. April 29, 1851.

§ 779. The court may fix such compensation. If such consent be not given, filed, and entered, as provided in the last section, at or before a judgment of sale is rendered, the court must ascertain and determine what proportion of the proceeds of the sale, after deducting expenses, will be a just and reasonable sum to be allowed on account of such estate, and must order the same to be paid to such party, or deposit in court for him, as the case may require. En. March 11, 1872.

Prac. Act, sec. 291. En. April 29, 1851.

§ 780. The court must protect tenants unknown. If the persons entitled to such estate for life or years be unknown, the court must provide for the protection of their rights, in the same manner, as far as may be, as if they were known and had appeared. En. March 11, 1872.

Prac. Act, sec. 292. En. April 29, 1851.

§ 781. The court must ascertain and secure the value of future, contingent or vested interests. In all cases of sales, when it appears that any person has a vested or contingent future right or estate in any of the property sold, the court must ascertain and settle the proportional value of such contingent or vested right or estate, and must direct such proportion of the proceeds of the sale to be invested, secured, or paid over, in such manner as to protect the rights and interests of the parties. En. March 11, 1872.

Prac. Act, sec. 293. En. April 29, 1851.

Cal. Rep. Cit. 35, 592.

§ 782. Terms of sale must be made known at the time. Lots must be sold separately. In all cases of sales of property the terms must be made known at the time; and if the premises consist of distinct farms or lots, they must be sold separately. En. March 11, 1872.

Cal. Rep. Cit. 66, 121.

Prac. Act, sec. 294. En. April 29, 1851.

§ 783. Who may not be purchasers. Neither of the referees, nor any person for the benefit of either of them, can be interested in any purchase; nor can a guardian of an infant party be interested in the purchase of any real property, being the subject of the action, except for the benefit of the infant. All sales contrary to the provisions of this section are void. En. March 11, 1872.

Prac. Act, sec. 295. En. April 29, 1851.

§784
Am'd.
p. 464

§ 784. Referee must make a report of the sale to the court. After completing a sale of the property, or any part thereof ordered to be sold, the referees must report the same to the court, with a description of the different parcels of land sold to each purchaser; the name of the

purchaser; the price paid or secured; the terms and conditions of the sale, and the securities, if any, taken. The report must be filed in the office of the clerk of the county where the property is situated. En. March 11, 1872.

Cal. Rep. Cit. 137, 59.

Prac. Act, sec. 296. En. April 29, 1851.

Cal. Rep. Cit. 1, 390.

§785
Am'd.
p. 465

§ 785. If confirmed, conveyances may be executed. If the sale be confirmed by the court, an order must be entered, directing the referees to execute conveyances and take securities pursuant to such sale, which they are hereby authorized to do. Such order may also give directions to them respecting the disposition of the proceeds of the sale. En. March 11, 1872.

Cal. Rep. Cit. 118, 666; 137, 59.

Prac. Act, sec. 297. En. April 29, 1851.

Cal. Rep. Cit. 27, 401.

§ 786. Proceeding if a lienholder becomes a purchaser. When a party entitled to a share of the property, or an encumbrancer entitled to have his lien paid out of the sale, becomes a purchaser, the referees may take his receipt for so much of the proceeds of the sale as belongs to him. En. March 11, 1872.

Cal. Rep. Cit. 116, 434.

Prac. Act, sec. 298. En. April 29, 1851.

§ 787. Conveyance must be recorded, and will be a bar against parties. The conveyances must be recorded in the county where the premises are situated, and shall be a bar against all persons interested in the property in any way who shall have been named as parties in the action, and against all such parties and persons as were unknown, if the summons was served by publication, and against all persons claiming under them, or either of them, and against all persons having unrecorded deeds or liens at the commencement of the action. En. March 11, 1872. Am'd. 1873-4, 326.

Prac. Act, sec. 299. En. April 29, 1851.

§ 788. Proceeds of sale belonging to parties unknown must be invested for their benefit. When there are pro-

ceeds of a sale belonging to an unknown owner, or to a person without the state, who has no legal representative within it, the same must be invested in bonds of this state or of the United States, for the benefit of the persons entitled thereto. En. March 11, 1872.

Prac. Act, sec. 300. En. April 29, 1851.

§ 789. Investment must be made in the name of the clerk of the county. When the security of the proceeds of sale is taken, or when an investment of any such proceeds is made, it must be done, except as herein otherwise provided, in the name of the clerk of the county where the papers are filed, and his successors in office, who must hold the same for the use and benefit of the parties interested, subject to the order of the court. En. March 11, 1872.

Cal. Rep. Cit. 66, 447.

Prac. Act, sec. 301. En. April 29, 1851.

§ 790. When the interests of the parties are ascertained, securities must be taken in their names. When security is taken by the referees on a sale, and the parties interested in such security by an instrument in writing, under their hands, delivered to the referees, agree upon the shares and proportions to which they are respectively entitled, or when shares and proportions have been previously adjudged by the court, such securities must be taken in the names of, and payable to, the parties respectively entitled thereto, and must be delivered to such parties upon their receipt therefor. Such agreement and receipt must be returned and filed with the clerk. En. March 11, 1872.

Prac. Act, sec. 302. En. April 29, 1851.

§ 791. Duties of the clerk making investments. The clerk in whose name a security is taken, or by whom an investment is made, and his successors in office, must receive the interest and principal as it becomes due, and apply and invest the same as the court may direct; and must deposit with the county treasurer all securities taken, and keep an account in a book provided and kept for that purpose, in the clerk's office, free for inspection by all persons, of investments and moneys received by him thereon, and the disposition thereof. En. March 11, 1872.

Cal. Rep. Cit. 56, 129; 66, 447.

Prac. Act, sec. 303. En. April 29, 1851.

Cal. Rep. Cit. 2, 63.

Deposit in court: Secs. 572-574, 2104.

§ 792. When unequal partition is ordered, compensation may be adjudged in certain cases. When it appears that partition cannot be made equal between the parties, according to their respective rights, without prejudice to the rights and interests of some of them, and a partition be ordered, the court may adjudge compensation to be made by one party to another, on account of the inequality; but such compensation shall not be required to be made to others by owners unknown, nor by an infant, unless it appears that such infant has personal property sufficient for that purpose, and that his interest will be promoted thereby. And in all cases, the court has power to make compensatory adjustment between the respective parties, according to the ordinary principles of equity. En. March 11, 1872.

Prac. Act, sec. 304. En. April 29, 1851. Am'd. 1866, 706.

Cal. Rep. Cit. 2, 63; 64, 269.

§ 793. The share of an infant may be paid to his guardian. When the share of an infant is sold, the proceeds of the sale may be paid by the referee making the sale, to his general guardian or the special guardian appointed for him in the action, upon giving the security required by law or directed by order of the court. En. March 11, 1872.

Prac. Act, sec. 305. En. April 29, 1851.

Cal. Rep. Cit. 2, 63; 64, 269.

General guardian: Post, secs. 1747-1809.

Guardian ad litem, generally: Ante, secs. 372, 373.

§ 794. The guardian of an insane person may receive the proceeds of such party's interest. The guardian who may be entitled to the custody and management of the estate of an insane person, or other person adjudged incapable of conducting his own affairs, whose interest in real property has been sold, may receive, in behalf of such person, his share of the proceeds of such real property from the referees, on executing, with sufficient sureties, an undertaking, approved by a judge of the court, that he will

faithfully discharge the trust reposed in him, and will render a true and just account to the person entitled, or to his legal representative. En. March 11, 1872. Am'd. 1880, 11.

Prac. Act, sec. 306. En. April 29, 1851.

§795
Repl'd.
p. 465

Cal. Rep. Cit. 64, 269; 117, 677.

§ 795. A guardian may consent to partition without action, and execute releases. The general guardian of an infant, and the guardian entitled to the custody and management of the estate of an insane person, or other person adjudged incapable of conducting his own affairs, who is interested in real estate held in joint tenancy, or in common, or in any other mannner so as to authorize his being made a party to an action for the partition thereof, may consent to a partition without action, and agree upon the share to be set off to such infant or other person entitled, and may execute a release, in his behalf, to the owners of the shares, of the parts to which they may be respectively entitled, upon an order of the court. En. March 11, 1872.

Cal. Rep. Cit. 80, 500.

Prac. Act, sec. 307. En. April 29, 1851.

§ 796. Costs of partition a lien upon shares of parcn-ers. The costs of partition, including reasonable counsel fees, expended by the plaintiff or either of the defendants, for the common benefit, fees or [of] referees, and other disbursements, must be paid by the parties respectively entitled to share in the lands divided, in proportion to their respective interests therein, and may be included and specified in the judgment. In that case, they shall be a lien on the several shares, and the judgment may be enforced, by execution, against such shares, and against other property held by the respective parties. When, however, litigation arises between some of the parties only, the court may require the expense of such litigation to be paid by the parties thereto, or any of them. En. March 11, 1872. Am'd. 1873-4, 326.

Cal. Rep. Cit. 68, 388; 103, 170; 136, 170.

Prac. Act, sec. 308. En. April 29, 1851. Am'd. 1871-2, 230.

Cal. Rep. Cit. 16, 471; 117, 676.

Referees' fees, etc.: Ante, sec. 768; post, sec. 1028.

§797
Repl'd.
p. 465

§ 797. The court, by consent, may appoint a single referee. The court, with the consent of the parties, may appoint a single referee, instead of three referees, in the proceedings under the provisions of this chapter; and the single referee, when thus appointed, has all the powers and may perform all the duties required of the three referees. En. March 11, 1872.

Cal. Rep. Cit. 80, 500; 80, 501.

Prac. Act, sec. 309. En. April 29, 1851.

Cal. Rep. Cit. 29, 255; 34, 374.

Referees: Sec. 763, ante.

§ 798. Expenses of previous litigation for common benefit allowed. If it appear that other actions or proceedings have been necessarily prosecuted or defended by any one of the tenants in common, for the protection, confirmation, or perfecting of the title, or setting the boundaries, or making a survey or surveys of the estate partitioned, the court shall allow to the parties to the action who have paid the expense of such litigation or other proceedings, all the expenses necessarily incurred therein, except counsel fees, which shall have accrued to the common benefit of the other tenants in common, with interest thereon from the date of making the said expenditures, and in the same kind of money expended or paid, and the same must be pleaded and allowed by the court and included in the final judgment, and shall be a lien upon the share of each tenant, respectively, in proportion to his interest, and shall be enforced in the same manner as taxable costs of partition are taxed and collected. En. March 11, 1872. Rep. 1373-4, 326. En. 1875-6, 97.

Cal. Rep. Cit. 68, 333.

§799
Am'd.
p. 465

§ 799. Abstract of title in action for partition—When cost of allowed. If it appears to the court that it was necessary to have made an abstract of the title to the property to be partitioned, and such abstract shall have been procured by the plaintiff, or if the plaintiff shall have failed to have the same made before the commencement of the action, and any one of the defendants shall have had such abstract afterward made, the cost of the abstract, with interest thereon from the time the same is subject

to the inspection of the respective parties to the action, must be allowed and taxed. Whenever such abstract is produced [procured?] by the plaintiff, before the commencement of the action, he must file with his complaint a notice that an abstract of the title has been made, and is subject to the inspection and use of all the parties to the action, designating therein where the abstract will be kept for inspection. But if the plaintiff shall have failed to procure such abstract before commencing the action, and any defendant shall procure the same to be made, he shall, as soon as he has directed it to be made, file a notice thereof in the action, with the clerk of the court, stating who is making the same and where it will be kept when finished. The court or the judge thereof may direct, from time to time, during the progress of the action, who shall have the custody of the abstract. En. March 11, 1872.

Cal. Rep. Cit. 64, 629; 90, 455.

§ 800. Abstract, how made and verified. The abstract mentioned in the last preceding section may be made by any competent searcher of records, and need not be certified by the recorder or other officer, but instead thereof, it must be verified by the affidavit of the person making it, to the effect that he believes it to be correct; but the same may be corrected from time to time, if found incorrect, under the direction of the court. En. March 11, 1872.

§ 801. Interest allowed on disbursements made under direction of the court. Whenever, during the progress of the action for partition, any disbursements shall have been made, under the direction of the court, or the judge thereof, by a party thereto, interest must be allowed thereon from the time of making such disbursements. En. March 11, 1872. Cal. Rep. Cit., 141, 385.

CHAPTER V.

ACTIONS FOR THE USURPATION OF AN OFFICE OR FRANCHISE.

- § 802. Certain writs abolished.
- § 803. Action may be brought against any party usurping, etc., any office or franchise.
- § 804. Name of person entitled to office may be set forth in the complaint. If fees have been received by the usurper, he may be arrested.
- § 805. Judgment may determine the rights of both incumbent and claimant.
- § 806. When rendered in favor of applicant.
- § 807. Damages may be recovered by successful applicant.
- § 808. When several persons claim the same office, their rights may be determined by a single action.
- § 809. If defendant found guilty, what judgment to be rendered against him.
- § 810. Undertaking when action brought upon information of private party.

Gen. Cit. to Chap.—Cal. Rep. Cit. 85, 242.

§ 802. Certain writs abolished. The writ of scire facias is abolished. En. March 11, 1872. Am'd. 1880. 11.

Cal. Rep. Cit. 73, 493; 77, 372; 77, 376; 79, 106; 84, 120; 84, 265; 84, 380; 108, 436; 129, 326; 129, 327.

Corporations, dissolution of.—By the Civil Code, secs. 39, 400, it is declared that the dissolution of corporations is provided for, if involuntary, by this chapter of this code; if voluntary, by part 3, title 6, secs. 1227-1233 of this code.

Receivers upon dissolution of corporation: Ante, sec. 565.

§ 803. Action may be brought against any party usurping, etc., any office or franchise. An action may be brought by the attorney general, in the name of the people of this state, upon his own information, or upon the complaint of a private party, against any person who usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise within this state. And the attorney general must bring the action, whenever he has reason to believe that any such office or franchise has been usurped, intruded into, or unlawfully held or exercised by any person, or when he is directed to do so by the governor. En. March 11, 1872.

Cal. Rep. Cit. 54, 321; 55, 616; 66, 288; 69, 463; 73, 491; 76, 437; 77, 372; 82, 243; 84, 120; 84, 376; 92, 614;

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96, 606; 100, 541; 101, 148; 114, 474; 115, 284; 116, 109;
117, 614; 117, 615; 117, 616; 123, 146; 125, 529; 127,
349; 127, 571; 128, 259; 129, 546; 132, 190; 145, 760.

Prac. Act, sec. 310. En. April 29, 1851.

Cal. Rep. Cit. 24, 127.

Complaint: Post, sec. 804; security by relator: Post, sec. 810.

Franchise—Civ. Code, sec. 358.

Dissolution of corporations: Civ. Code, secs. 399, 400.

Quo warranto, what court may issue: Ante, sec. 76, subd. 5.

Office, title to—Contesting elections: Post, secs. 1111-1127.

Mandamus to compel admission to office: Post, sec. 1085.

§ 804. Name of person entitled to office may be set forth in the complaint. If fees have been received by the usurper, he may be arrested. Whenever such action is brought, the attorney general, in addition to the statement of the cause of action, may also set forth in the complaint the name of the person rightly entitled to the office, with a statement of his right thereto; and in such case upon proof by affidavit that the defendant has received fees or emoluments belonging to the office, and by means of his usurpation thereof, an order may be granted by a justice of the supreme court, or a judge of the superior court, for the arrest of such defendant and holding him to bail; and thereupon he may be arrested and held to bail in the same manner, and with the same effect, and subject to the same rights and liabilities, as in other civil actions where the defendant is subject to arrest. En. March 11, 1872. Am'd. 1880, 11, 12.

Prac. Act, sec. 311. En. April 29, 1851.

Action—Where several claimants: Post, sec. 808. Arrest and bail: Secs. 478 et seq.

§ 805. Judgment may determine the rights of both incumbent and claimant. In every such action, judgment may be rendered upon the right of the defendant, and also upon the right of the party so alleged to be entitled, or only upon the right of the defendant, as justice may require. En. March 11, 1872.

Cal. Rep. Cit. 69, 464; 73, 491; 118, 400; 132, 283.

Prac. Act, sec. 312. En. April 29, 1851.

Cal. Rep. Cit. 27, 475.

Judgment: Post, sec. 809.

§ 806. When rendered in favor of applicant. If the judgment be rendered upon the right of the person so alleged to be entitled, and the same be in favor of such person, he will be entitled, after taking the oath of office, and executing such official bond as may be required by law, to take upon himself the execution of the office. En. March 11, 1872.

Cal. Rep. Cit. 115, 283; 138, 39.

Prac. Act, sec. 313. En. April 29, 1851.

§ 807. Damages may be recovered by successful applicant. If judgment be rendered upon the right of the person so alleged to be entitled, in favor of such person, he may recover, by action, the damages which he may have sustained by reason of the usurpation of the office by the defendant. En. March 11, 1872.

Cal. Rep. Cit. 118, 397; 118, 400.

Prac. Act, sec. 314. En. April 29, 1851.

Costs and fine: Post, sec. 809.

§ 808. When several persons claim the same office, their rights may be determined by a single action. When several persons claim to be entitled to the same office or franchise, one action may be brought against all such persons, in order to try their respective rights to such office or franchise. En. March 11, 1872.

Cal. Rep. Cit. 124, 13.

Prac. Act, sec. 315. En. April 29, 1851.

§ 809. If defendant found guilty, what judgment to be rendered against him. When a defendant, against whom such action has been brought, is adjudged guilty of usurping or intruding into, or unlawfully holding any office, franchise, or privilege, judgment must be rendered that such defendant be excluded from the office, franchise, or privilege, and that he pay the costs of the action. The court may also, in its discretion, impose upon the defendant a fine not exceeding five thousand dollars, which fine,

when collected, must be paid into the treasury of the state. En. March 11, 1872.

Cal. Rep. Cit. 79, 109; 82, 243; 84, 120; 84, 376; 84, 380; 114, 479; 118, 400; 129, 546; 129, 547; 129, 548.

Prac. Act, sec. 316. En. April 29, 1851.

§ 810. Undertaking when action brought upon information of private party. When the action is brought upon the information or application of a private party, the attorney general may require such party to enter into an undertaking, with sureties to be approved by the attorney general, conditioned that such party or the sureties will pay any judgment for costs or damages recovered against the plaintiff, and all the costs and expenses incurred in the prosecution of the action. En. Stats. 1873-4, 326.

Cal. Rep. Cit. 69, 221; 69, 463; 75, 148; 76, 437; 79, 106; 84, 365; 108, 436; 108, 736; 129, 326; 129, 327.

CHAPTER VI.

OF ACTIONS AGAINST STEAMERS, VESSELS, AND BOATS.

- § 813. When vessels, etc., are liable. Their liabilities constitute liens.
- § 814. Actions, how brought.
- § 815. Complaint must be verified.
- § 816. Summons, service of.
- § 817. Plaintiff may have such vessel, etc., attached.
- § 818. The clerk must issue the writ of attachment.
- § 819. Such writ must be directed to the sheriff.
- § 820. Writ, execution of.
- § 821. The owner, master, etc., may appear and defend such vessel.
- § 822. Discharge of attachment.
- § 823. After appearance, attachment may, on motion, be discharged.
- § 824. When not discharged such vessel, etc., may be sold at public auction. Application of proceeds.
- § 825. Mariners and others may assert their claim for wages, notwithstanding prior attachment.
- § 826. Proof of the claims of mariners and others.
- § 827. Sheriff's notice of sale to contain measurement, tonnage, etc.

§ 813. When vessels, etc., are liable. Their liabilities constitute liens. All steamers, vessels, and boats are liable:

1. For services rendered on board at the request of, or on contract with, their respective owners, masters, agents, or consignees.

2. For supplies furnished in this state for their use, at

the request of their respective owners, masters, agents, or consignees.

3. For work done or materials furnished in this state for their construction, repair, or equipment.

4. For their wharfage and anchorage within this state.

5. For nonperformance, or malperformance, of any contract for the transportation of persons or property between places within the state, made by their respective owners, masters, agents, or consignees.

6. For injuries committed by them to persons or property in this state.

Demands for these several causes constitute liens upon all steamers, vessels and boats, and have priority in their order herein enumerated, and have preference over all other demands; but such liens only continue in force for the period of one year from the time the cause of action accrued. En. March 11, 1872. Am'd. 1873-4, 327.

Cal. Rep. Cit. 124, 215; 133, 481; 142, 242; 142, 243; 142, 244. Subd. 2—142, 141.

Prac. Act, sec. 317. En. April 29, 1851. Am'd. 1860, 304.

Cal. Rep. Cit. 13, 371; 18, 532.

Seamen's wages, jurisdiction of actions: Ante, sec. 114.

Salvage: Civ. Code, sec. 2079.

Preference over all other demands, as to labor claims: Post, secs. 1204-1206.

Lien, defined: Sec. 1180.

Justices of the peace have not jurisdiction where the suit or proceeding is for the recovery of seamen's wages for a voyage performed, in whole or in part, without the waters of this state: Ante, sec. 114.

§ 814. **Actions, how brought.** Actions for any of the causes specified in the preceding section must be brought against the owners by name, if known, but if not known, that fact shall be stated in the complaint, and the defendants shall be designated as unknown owners. Other persons having a lien upon the vessel may be made defendants to the action, the nature and amount of such lien being stated in the complaint. En. March 11, 1872. Am'd. 1873-4, 328.

Prac. Act, sec. 318. En. April 29, 1851.

Unknown owners—Fictitious designation of: Ante, sec. 474.

Parties, generally: Ante, secs. 367 et seq.

§ 815. Complaint must be verified. The complaint must designate the steamer, vessel, or boat by name, and must be verified by the oath of the plaintiff, or some one on his behalf. En. March 11, 1872.

Prac. Act, sec. 319. En. April 29, 1851.

Verification of pleadings: Ante, sec. 446.

§ 816. Summons, service of. The summons and copy of the complaint must be served on the owners if they can be found; otherwise, they may be served on the master, mate, or person having charge of the steamer, vessel or boat. En. March 11, 1872. Am'd. 1873-4, 328; 1880, 12.

Prac. Act, sec. 320. En. April 29, 1851.

Service of summons generally: Ante, secs. 410 et seq.

§ 817. Plaintiff may have such vessel, etc., attached. The plaintiff, at the time of issuing the summons, or at any time afterward, may have the steamer, vessel, or boat, with its tackle, apparel, and furniture, attached as security for the satisfaction of any judgment that may be recovered in the action. En. March 11, 1872. Am'd. 1873-4, 328.

Prac. Act, sec. 321. En. April 29, 1851.

Attachment generally: Ante, secs. 537 et seq.

§ 818. The clerk must issue the writ of attachment. The clerk of the court must issue a writ of attachment on the application of the plaintiff, upon receiving a written undertaking on behalf of the plaintiff, executed by two or more sufficient sureties, to the effect that if the judgment be rendered in favor of the owner of the steamer, vessel, or boat, as the case may be, he will pay all costs and damages that may be awarded against him, and all damages that may be sustained by him from the attachment, not exceeding the sum specified in the undertaking, which shall in no case be less than five hundred dollars. En. March 11, 1872. Am'd. 1873-4, 328.

Prac. Act, sec. 322. En. April 29, 1851.

Attachment bond, generally: Compare sec. 539, ante.

Qualifications of sureties: Post, sec. 1057.

§ 819. Such writ must be directed to the sheriff. The writ must be directed to the sheriff of the county within which the steamer, vessel, or boat lies, and direct him to

attach such steamer, vessel, or boat, with its tackle, apparel, and furniture, and keep the same in his custody until discharged in due course of law. En. March 11, 1872. Am'd. 1873-4, 329.

Prac. Act, sec. 323. En. April 29, 1851.

§ 820. **Writ, execution of.** The sheriff to whom the writ is directed and delivered must execute it without delay, and must attach and keep in his custody the steamer, vessel, or boat named therein, with its tackle, apparel, and furniture, until discharged in due course of law; but the sheriff is not authorized by any such writ to interfere with the discharge of any merchandise on board of such steamer, vessel, or boat, or with the removal of any trunks or other property of passengers, or of the captain, mate, seamen, steward, cook, or other persons employed on board. En. March 11, 1872. Am'd. 1873-4, 329.

Prac. Act, sec. 324. En. April 29, 1851.

§ 821. **The owner, master, etc., may appear and defend such vessel.** The owner, or the master, agent, or consignee of the steamer, vessel, or boat, may, on behalf of the owner, appear and answer, or plead to the action; and may except to the sufficiency of the sureties on the undertaking filed on behalf of the plaintiff, and may require sureties to justify, as upon bail on arrest. En. March 11, 1872. Am'd. 1873-4, 329.

Prac. Act, sec. 325. En. April 29, 1851.

Cal. Rep. Cit. 7, 409.

Appearance: Post, sec. 1014.

Answer: Ante, sec. 437.

Justification of sureties: Ante, sec. 495.

§ 822. **Discharge of attachment.** After the attachment is levied, the owner, or the master, agent, or consignee of the steamer, vessel, or boat, may, in behalf of the owner, have the attachment discharged, upon giving to the sheriff an undertaking of at least two sufficient sureties in an amount sufficient to satisfy the demand in suit, besides costs, or depositing that amount with the sheriff. Upon receiving such undertaking or amount, the sheriff must

restore to the owner, or the master, agent or consignee of the owner, the steamer, vessel, or boat attached. En. March 11, 1872. Am'd. 1873-4, 330.

Prac. Act, sec. 326. En. April 29, 1851.

Compare sec. 540.

§ 823. After appearance, attachment may, on motion, be discharged. After the appearance in the action of the owner, the attachment may, on motion, also be discharged, in the same manner, and on like terms and conditions, as attachments in other cases, subject to the provisions of sec. 825. En. March 11, 1872. Am'd. 1873-4, 330.

Prac. Act, sec. 327. En. April 29, 1851.

Discharge of attachment: Ante, secs. 554-558.

§ 824. When not discharged such vessel, etc., may be sold at public auction. Application of proceeds. If the attachment be not discharged, and a judgment be recovered in the action in favor of the plaintiff, and an execution be issued thereon, the sheriff must sell at public auction, after publication of notice of such sale for ten days, the steamer, vessel, or boat, with its tackle, apparel, and furniture, or such interest therein as may be necessary, and must apply the proceeds of the sale as follows:

1. When the action is brought for demands other than the wages of mariners, boatmen, and others employed in the service of the steamer, vessel, or boat sold, to the payment of the amount of such wages, as specified in the execution.

2. To the payment of the judgment and costs, including his fees.

3. He must pay any balance remaining to the owner, or to the master, agent, or consignee, who may have appeared on behalf of the owner, or if there be no appearance, then into court, subject to the claim of any party or parties legally entitled thereto. En. March 11, 1872. Am'd. 1873-4, 330.

Prac. Act, sec. 328. En. April 29, 1851.

Sale on execution, generally: Ante, secs. 694 et seq.

Payment into court: Ante, secs. 572-574; post, sec. 2104.

§ 825. Mariners and others may assert their claim for wages, notwithstanding prior attachment. Any mariner, boatman, or other person employed in the service of the steamer, vessel, or boat attached, who may wish to assert his claim for wages against the same, the attachments being issued for other demands than such wages, may file an affidavit of his claim, setting forth the amount and the particular service rendered, with the clerk of the court; and thereafter no attachment can be discharged upon filing an undertaking, unless the amount of such claim, or the amount determined as provided in the next section, be covered thereby, in addition to the other requirements; and any execution issued against such steamer, vessel, or boat, upon judgment recovered thereafter, must direct the application of the proceeds of any sale:

1. To the payment of the amount of such claims filed, or the amount determined as provided in the next section, which amount the clerk must insert in the writ;

2. To the payment of the judgment and costs and sheriff's fees, and must direct the payment of any balance to the owner, master, or consignee who may have appeared in the action; but if no appearance by them be made therein, it must direct a deposit of the balance in court. En. March 11, 1872.

Prac. Act, sec. 329. En. April 29, 1851.

Cal. Rep. Cit. 2, 310.

Preferred claims, for wages, etc.: Post, secs. 1204-1207.

Deposit in court: Ante, secs. 572 et seq.; post, sec. 2104.

§ 826. Proof of the claims of mariners and others. If the claim of the mariner, boatman, or other person, filed with the clerk of the court, as provided in the last section, be not contested within five days after notice of the filing thereof by the owner, master, agent, or consignee of the steamer, vessel, or boat against which the claim is filed, or by any creditor, it shall be deemed admitted; but if contested, the clerk must indorse upon the affidavit thereof a statement that it is contested, and the grounds of the contest, and must immediately thereafter order the matter to a single referee for his determination, or he may hear the proofs and determine the matter himself. The judgment of the clerk or referee may be reviewed by a court in

which the action is pending, or a judge thereof, immediately after the same is given, and the judgment of the court or judge shall be final. On the review, the court or judge may use the minutes of the proofs taken by the clerk or referee, or may take the proofs anew. En. March 11, 1872. Am'd. 1873-4, 331; 1880, 12.

Prac. Act, sec. 330. En. April 29, 1851.

§ 827. Sheriff's notice of sale to contain measurement, tonnage, etc. The notice of sale published by the sheriff must contain a statement of the measurement and tonnage of the steamer, vessel, or boat, and a general description of her condition. En. March 11, 1872.

Prac. Act, secs. 331, 332. En. April 29, 1851.

TITLE XI.

OF PROCEEDINGS IN JUSTICES' COURTS.

- Chapter I. Place of Trial of Actions in Justices' Courts, §§ 832-838.
- II. Manner of Commencing Actions in Justices' Courts, §§ 839-850.
- III. Pleadings in Justices' Courts, §§ 851-860.
- IV. Provisional Remedies in Justices' Courts, §§ 861-870.
- V. Judgment by Default in Justices' Courts, §§ 871, 872.
- VI. Time of Trial and Postponements in Justices' Courts, §§ 873-877.
- VII. Trials in Justices' Courts, §§ 878-887.
- VIII. Judgments (Other than by Default) in Justices' Courts, §§ 889-900.
- IX. Executions from Justices' Courts, §§ 901-905.
- X. Contempts in Justices' Courts, §§ 906-910.
- XI. Dockets of Justices, §§ 911-918.
- XII. General Provisions Relating to Justices' Courts, §§ 919-926.

CHAPTER I.

PLACE OF TRIAL OF ACTIONS IN JUSTICES' COURTS.

- § 832. Actions, in what township or city may be commenced.
- § 833. Place of trial may be changed in certain cases.
- § 834. Limitation on the right to change.
- § 835. To what court transferred.
- § 836. Proceedings after order changing place of trial.
- § 837. Effect of an order changing place of trial.
- § 838. Transfer of cases to the superior court.

§ 832. Actions, in what township or city may be commenced. Actions in justices' courts must be commenced, Am'd. and, subject to the right to change the place of trial, as in p. 466 this chapter provided, must be tried:

1. If there be no justices' court for the township or city in which the defendant resides: in any city or township of the county in which he resides.

2. When two or more persons are jointly, or jointly and severally, bound in any debt or contract, or otherwise jointly liable in the same action, and reside in different townships or different cities of the same county, or in different counties: in the township or city in which any of the persons liable may reside.

3. In cases of injury to the person or property: in the township or city where the injury was committed, or where the defendant resides.

4. If for the recovery of personal property, or the value thereof, or damages for taking or detaining the same: in the township or city in which the property may be found, or in which the property was taken, or in which the defendant resides.

5. When the defendant is a nonresident of the county: in any township or city wherein he may be found.

6. When the defendant is a nonresident of the state: in any township or city in the state.

7. When a person has contracted to perform an obligation at a particular place, and resides in another county, township, or city: in the township or city in which such obligation is to be performed, or in which he resides; and the township or city in which the obligation is incurred shall be deemed to be the township or city in which it is to be performed, unless there is a special contract to the contrary.

8. When the parties voluntarily appear and plead without summons: in any township or city in the state.

9. In all other cases: in the township or city in which the defendant resides. En. March 11, 1872. Am'd. 1873-4, 331.

Cal. Rep. Cit. 88, 410; 141, 267. Subd. 7—66, 442.

Prac. Act, sec. 535. En. April 29, 1851. Am'd. 1853, 278; 1867-8, 550.

Cal. Rep. Cit. 34, 326.

Place of trial generally: Ante, secs. 392 et seq.

Jurisdiction of justice court: Ante, secs. 112-115; post, sec. 925.

§ 833. Place of trial may be changed in certain cases. The court may, at any time before the trial, on motion, change the place of trial in the following cases:

1. When it appears to the satisfaction of the justice before whom the action is pending, by affidavit of either party, that such justice is a material witness for either party;

2. When either party makes and files an affidavit that he believes that he cannot have a fair and impartial trial before such justice, by reason of the interest, prejudice, or bias of the justice;

3. When a jury has been demanded, and either party makes and files an affidavit that he cannot have a fair and impartial trial, on account of the bias or prejudice of the citizens of the township or city against him;

4. When, from any cause, the justice is disqualified from acting;

5. When the justice is sick or unable to act. En. March 11, 1872.

Cal. Rep. Cit. 67, 106. Subd. 2—123, 413.

Prac. Act, sec. 582. En. April 29, 1851. Am'd. 1853, 279; 1863, 502.

Cal. Rep. Cit. 22, 37; 123, 413.

Change of venue, generally: Ante, secs. 397 et seq.

§ 834. Limitation on the right to change. The place of trial cannot be changed, on motion of the same party, more than once, upon any or all the grounds specified in the first, second, and third subdivisions of the preceding section. En. March 11, 1872.

§ 835. To what court transferred. When the court orders the place of trial to be changed, the action must be transferred for trial to a court the parties may agree upon; and if they do not so agree, then to another justices' court in the same county. En. March 11, 1872.

§ 836. Proceedings after order changing place of trial. After an order has been made, transferring the action for trial to another court, the following proceedings must be had:

1. The justice ordering the transfer must immediately transmit to the justice of the court to which it is transferred, on payment by the party applying of all the costs that have accrued, all the papers in the action, together

with a certified transcript from his docket of the proceedings therein;

2. Upon the receipt by him of such papers, the justice of the court to which the case is transferred must issue a notice, stating when and where the trial will take place, which notice must be served upon the parties at least one day before the time fixed for trial. En. March 11, 1872.

§837 Cal. Rep. Cit. 67, 106.

Am'd.

p. 467 § 837. Effect of an order changing place of trial. From the time the order changing the place of trial is made the court to which the action is thereby transferred has the same jurisdiction over it as though it had been commenced in such court. En. March 11, 1872.

Cal. Rep. Cit. 50, 443.

§ 838. Transfer of cases to the superior court. The parties to an action in a justices' court cannot give evidence upon any question which involves the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine; nor can any issue presenting such question be tried by such court; and if it appear, from the answer of the defendant, verified by his oath, that the determination of the action will necessarily involve the question of title or possession to real property, or the legality of any tax, impost, assessment, toll, or municipal fine, the justice must suspend all further proceedings in the action and certify the pleadings, and, if any of the pleadings are oral, a transcript of the same, from his docket to the clerk of the superior court of the county; and from the time of filing such pleadings or transcript with the clerk, the superior court shall have over the action the same jurisdiction as if it had been commenced therein; provided, that in cases of forcible entry and detainer, of which justices' courts have jurisdiction, any evidence, otherwise competent, may be given, and any question properly involved therein may be determined. En. March 11, 1872. Am'd. 1880, 18.

Cal. Rep. Cit. 50, 510; 51, 501; 56, 147; 66, 638; 66, 641; 69, 558; 76, 184; 76, 185; 77, 542; 80, 560; 80, 562; 92, 51; 95, 380; 103, 139; 103, 140; 103, 141; 103, 142; 114, 505; 114, 506; 114, 507; 126, 516; 126, 574; 131, 217; 135, 68; 140, 135.

Prac. Act, sec. 581. En. April 29, 1851. Am'd. 1864, 117.

Cal. Rep. Cit. 9, 50; 17, 69.

Certifying to superior court, from justices' courts in cities and counties: Ante, sec. 92.

Title or possession of realty involved: Ante, sec. 112, subd. 2.

Legality of tax, etc., involved: Ante, sec. 112, subd. 4.

Forcible entry and detainer, jurisdiction of: Ante, sec. 113, subd. 1.

CHAPTER II.

MANNER OF COMMENCING ACTIONS IN JUSTICES' COURTS.

- § 839. Actions, how commenced.
- § 840. Summons may issue within a year.
- § 841. Defendant may waive summons.
- § 842. Parties may appear in person or by attorney.
- § 843. When guardian necessary, how appointed.
- § 844. Summons, how issued, directed, and what to contain.
- § 845. Time for appearance of defendant.
- § 846. Alias summons.
- § 847. Same.
- § 848. Service of summons outside of county.
- § 849. Summons, by whom and how served and returned.
- § 850. Notice of hearing.

§ 839. Actions, how commenced. An action in a justice's court is commenced by filing a complaint. En. March 11, 1872. Am'd. 1875-6, 98.

Cal. Rep. Cit. 81, 38.

Prac. Act, sec. 538. En. April 29, 1851. Am'd. 1869-70, 637.

Actions, in cities and counties, title, etc.: Sec. 89.

Commencement of action: Secs. 350, 405. Action, when pending: Post. sec. 1049.

Complaint generally: Ante, sec. 426.

Fees payable in advance: Sec. 91, ante.

§ 840. Summons may issue within a year. The court must indorse on the complaint the date upon which it was filed, and at any time within one year thereafter the plaintiff may have summons issued. En. March 11, 1872.

Issuance of summons, generally: Ante, sec. 406.

Payment of fees, in cities and counties: Ante, sec. 91.

§ 841. Defendant may waive summons. At any time after the complaint is filed, the defendant may, in writing,

or by appearing and pleading, waive the issuing of summons. En. March 11, 1872.

Waiver—compare sec. 406, ante.

§ 842. Parties may appear in person or by attorney. Parties in justices' courts may appear and act in person or by attorney; and any person except the constable by whom the summons or jury process was served, may act as attorney. En. March 11, 1872.

Cal. Rep. Cit. 72, 38.

Prac. Act, sec. 534. En. April 29, 1851.

Justices' court practitioners: Ante, sec. 96.

Attorneys, generally: Ante, secs. 275 et seq.

§ 843. When guardian necessary, how appointed. When an infant, insane, or incompetent person is a party, he must appear, either by his general guardian if he have one, or by a guardian ad litem appointed by the justice. When a guardian ad litem is appointed by the justice, he must be appointed as follows:

1. If the infant, insane, or incompetent person be plaintiff, the appointment must be made before the summons is issued, upon the application of the infant, if he be of the age of fourteen years; if under that age, or if insane or incompetent, upon the application of a relative or friend.

2. If the infant, insane, or incompetent person be defendant, the appointment must be made at the time the summons is returned, or before the answer, upon the application of the infant, if he be of the age of fourteen years, and apply at or before the summons is returned; if he be under the age of fourteen, or be insane or incompetent, or neglect so to apply, then upon the application of a relative or friend, or any other party to the action, or by the justice, on his own motion. En. March 11, 1872. Am'd. 1873-4, 333; 1880, 18.

Prac. Act, sec. 539. En. April 29, 1851.

Guardians—compare secs. 372, 373, ante.

§ 844. Summons, how issued, directed, and what to contain. The summons must be directed to the defendant, signed by the justice, and must contain:

1. The title of the court, name of the county, city and

county, or township in which the action is brought, and the names of the parties thereto;

2. A direction that the defendant appear and answer before the justice, at his office, as specified in section eight hundred and forty-five of this code;

3. A notice that unless the defendant so appear and answer, the plaintiff will take judgment for any money or damages demanded in the complaint, as arising upon contract, or will apply to the court for the relief demanded in the complaint. If the plaintiff appears by attorney, the name of the attorney must be indorsed upon the summons. En. March 11, 1872. Am'd. 1875-6, 98; 1880, 19; 1899, 100.

Cal. Rep. Cit. 67, 397; 107, 118. Subd. 1—120, 514. Subd. 5—67, 396.

Prac. Act, sec. 540. En. April 29, 1851.

Contents of summons—compare sec. 407, ante.

§ 845. Time for appearance of defendant. The time specified in the summons for the appearance of the defendant must be as follows:

1. If an order of arrest be indorsed upon the summons, forthwith.

2. In all other cases, the summons must contain a direction that the defendant must appear and answer the complaint within five days, if the summons be served in the city and county, township, or city, in which the action is brought; within ten days, if served out of the township or city, but in the county in which the action is brought, and within twenty days, if served elsewhere. En. March 11, 1872. Am'd. 1873-4, 407; 1875-6, 99; 1880, 19.

Cal. Rep. Cit. 71, 159.

Prac. Act, sec. 541. En. April 29, 1851. Am'd. 1854, 67; 1867-8, 551.

Cal. Rep. Cit. 8, 340; 34, 645.

§ 846. Alias summons. If the summons is returned without being served upon any or all of the defendants, the justice, upon the demand of the plaintiff, may issue an alias summons in the same form as the original, except that he may fix the time for the appearance of the defendant at a period not to exceed ninety days from its date. En. March 11, 1872.

Alias summons, generally, Ante, sec. 408.

§ 847. Same. The justice may, within a year from the date of the filing of the complaint, issue as many alias summons as may be demanded by the plaintiff. En. March 11, 1872.

§848 Alias summons: Ante, sec. 408.

Am'd.

p. 467 § 848. Service of summons outside of county. The summons cannot be served out of the county of the justice before whom the action is brought, except when the action is brought upon a joint contract or obligation of two or more persons, who reside in different counties and the summons has been served upon the defendant, resident of the county, in which case the summons may be served upon the other defendant out of the county; and except, also, when an action is brought against a party who has contracted to perform an obligation at a particular place, and resides in a different county, in which case summons may be served in the county where he resides; and except, also, where an action is brought for injury to person or property, and the defendant resides in a different county, in which case summons may be served in the county where the defendant resides. En. March 11, 1872. Am'd. 1873-4, 333; 1875-6, 99.

Cal. Rep. Cit. 66, 442; 71, 556; 97, 57.

Process of justices' courts—extent of: Ante, secs. 94, 106.

§ 849. Summons, by whom and how served and returned. The summons may be served by a sheriff or constable of any of the counties of this state or by any other person of the age of eighteen years or over not a party to the action. When a summons issued by a justice of peace is to be served out of the county in which it is issued the summons must have attached to it a certificate under seal by the county clerk of such county to the effect that the person issuing the same was an acting justice of the peace at the date of the summons and must be served and returned as provided in title five, part two of the code, or it may be served by publication and sections four hundred and thirteen and four hundred and twelve so far as they relate to the publication of summons are made applicable to justices' courts, the word justice being substituted for the word judge wherever the latter word occurs. En. March 11, 1872. Am'd. 1873-4, 407; 1891, 51; 1905, 27.

Cal. Rep. Cit. 59, 473; 59, 493; 73, 4; 138, 610.

Prac. Act, sec. 542. En. April 29, 1851.

Prac. Act, sec. 613. En. April 29, 1851. Am'd. 1860, 305; 1865-6, 467.

Prac. Act, sec. 614. En. April 29, 1851.

The act of 1875-6, 855, relating to the service of summons in justice's court in San Francisco was superseded by this section.

Publication, service by: Ante, secs. 412, 413.

§ 850. Notice of hearing. When all the parties served with process shall have appeared, or some of them have appeared, and the remaining defendants have made default, the justice must fix the day for the trial of said cause, whether the issue is one of law or fact, and give notice thereof to the parties to the action who have appeared, but in case any of the parties are represented by an attorney, then to such attorney. Such notice shall be in writing, signed by the justice, and substantially in the following form (filling blanks according to the facts):

In the justice court, township (or city, or city and county), county, or city and county of, State of California plaintiff, vs., defendant. To, plaintiff, or attorney for plaintiff, and to , defendant, or , attorney for defendant.

You and each of you will please take notice that the undersigned justice of the peace before whom the above-entitled cause is pending, has set for hearing the demurrer of, filed in said cause (or has set the said cause for trial, as the case may be), before me at my office in said township (or city, or city and county), at o'clock M., on the day of 19.....

Dated this day of 19.....

(Signed)

Justice of the peace.

Said notice shall be served by mail or personally. When served by mail the justice of the peace shall deposit copies thereof in a sealed envelope in the post office at least ten days before the trial or hearing addressed to each of the persons on whom it is to be served at their place of resi-

dence and the postage prepaid thereon; provided that such notice shall be served by mail only when the attorney on whom service is to be made, resides out of the county in which said justice's court is situated. When personally served said notice shall be served at least five days before the trial or hearing on the persons on whom it is to be served by any person competent and qualified to serve a summons in a justices' court and when personally served it shall be served returned and filed in like manner as a summons. The judge shall enter on his docket the date of trial or hearing; and when such notice shall have been served by mail the justice shall enter on his docket the date of mailing such notice, of trial or hearing and such entry shall be prima facie evidence of the fact of such service. The parties are entitled to one hour in which to appear after the time fixed in said notice, but are not bound to remain longer than that time unless both parties have appeared and the justice being present is engaged in the trial of another cause. En. March 11, 1872. Am'd. 1875-6, 99; 1900-01, 598; 1905, 33.

Cal. Rep. Cit. 74, 344; 74, 345; 97, 524; 97, 526; 109, 617; 118, 276; 118, 296; 136, 366; 138, 650.

Time of trial: Post, secs. 873 et seq.

CHAPTER III.

PLEADINGS IN JUSTICES' COURTS.

- § 851. Form of pleadings.
- § 852. Pleadings in justices' courts.
- § 853. Complaint defined.
- § 854. When demurrer to complaint may be put in.
- § 855. Answer.
- § 856. If the defendant omits to set up counterclaim.
- § 857. When plaintiff may demur to answer.
- § 858. Proceedings on demurrer.
- § 859. Amendment of pleadings.
- § 860. Answer or demurrer to amended pleadings.

§ 851. Form of pleadings. Pleadings in justices' courts:

1. Are not required to be in any particular form, but must be such as to enable a person of common understanding to know what is intended;
2. May, except the complaint, be oral or in writing;
3. Must not be verified, unless otherwise provided in this title;
4. If in writing, must be filed with the justice;
5. If oral, an entry of their substance must be made in the docket, En. March 11, 1872.

Cal. Rep. Cit. 56, 525; 56, 526.

Prac. Act, sec. 571. En. April 29, 1851.

Cal. Rep. Cit. 9, 50; 20, 49.

Prac. Act, sec. 572. En. April 29, 1851

Subd. 3—verified answer: Ante, sec. 112, subd. 2, sec. 838.

§ 852. Pleadings in justices' courts. The pleadings are:

1. The complaint by the plaintiff;
2. The demurrer to the complaint;
3. The answer by the defendant;
4. The demurrer to the answer. En. March 11, 1872.

Prac. Act, sec. 570. En. April 29, 1851.

List of pleadings—generally: Ante, sec. 422.

§ 853. Complaint defined. The complaint in justices' courts is a concise statement, in writing, of the facts constituting the plaintiff's cause of action; or a copy of the account, note, bill, bond, or instrument upon which the action is based. En. March 11, 1872.

Cal. Rep. Cit. 122, 470; 135, 51.

Prac. Act, sec. 573. En. April 29, 1851.

Complaint—generally: Ante, sec. 426.

§ 854. When demurrer to complaint may be put in. The defendant may, at any time before answering, demur to the complaint. En. March 11, 1872.

Prac. Act, sec. 578. En. April 29, 1851.

Demurrer, generally: Ante, sec. 430.

§ 855. Answer. The answer may contain a denial of any or all of the material facts stated in the complaint, which the defendant believes to be untrue, and also a statement, in a plain and direct manner, of any other facts constituting a defense or counterclaim, upon which an action might be brought by the defendant against the plaintiff in a justices' court. En. March 11, 1872.

Cal. Rep. Cit. 110, 265.

Prac. Act, sec. 574. En. April 29, 1851.

Cal. Rep. Cit. 17, 85; 20, 49; 30, 546.

Answer, generally: Ante, sec. 437.

§ 856. If the defendant omits to set up counterclaim. If the defendant omit to set up a counterclaim in the

cases mentioned in the last section, neither he nor his assignee can afterward maintain an action against the plaintiff therefor. En. March 11, 1872.

Cal. Rep. Cit. 122, 199.

Counterclaim waived—generally: Ante, sec. 439..

§ 857. When plaintiff may demur to answer. When the answer contains new matter in avoidance, or constituting a defense or a counterclaim, the plaintiff may, at any time before the trial, demur to the same for insufficiency, stating therein the grounds of such demurrer. En. March 11, 1872.

Demurrer to answer—generally: Ante, sec. 443.

§ 858. Proceedings on demurrer. The proceedings on demurrer are as follows:

1. If the demurrer to the complaint is sustained, the plaintiff may, within such time, not exceeding two days, as the court allows, amend his complaint;

2. If the demurrer to a complaint is overruled, the defendant may answer forthwith;

3. If the demurrer to an answer is sustained, the defendant may amend his answer within such time, not exceeding two days, as the court may allow;

4. If the demurrer to an answer is overruled, the action must proceed as if no demurrer had been interposed. En. March 11, 1872.

Cal. Rep. Cit. 109, 616; 109, 617. Subd. 1—135, 5; 135,

6. Subd. 2—135, 5. Subd. 3—135, 6.

Proceedings on demurrer—compare secs. 472, 636 ante.

§ 859. Amendment of pleadings. Either party may, at any time before the conclusion of the trial, amend any pleading; but if the amendment is made after the issue, and it appears to the satisfaction of the court, by oath, that an adjournment is necessary to the adverse party in consequence of such amendment, an adjournment must be granted. The court may also, in its discretion, when an adjournment will by the amendment be rendered necessary, require as a condition to the allowance of such amendment, made after issue joined, the payment of costs to the adverse party, to be fixed by the court, not exceeding twenty dollars. The court may also, on such terms as may be just, and on payment of costs, relieve a party from a judgment by default taken against him by his mistake,

inadvertance, surprise, or excusable neglect, but the application for such relief must be made within ten days after notice of the entry of the judgment and upon an affidavit showing good cause therefor. En. March 11, 1872. Am'd. 1905, 254.

Cal. Rep. Cit. 74, 344; 75, 231; 75, 233; 75, 255; 97, 525; 109, 338; 120, 514; 127, 48; 133, 320.

Prac. Act, sec. 580. En. April 29, 1851.

Amendment, generally. Ante, sec. 473; adjournment because of: Post, sec. 874, subd. 2.

§ 860. Answer or demurrer to amended pleadings. When a pleading is amended, the adverse party may answer or demur to it within such time, not exceeding two days, as the court may allow. En. March 11, 1872.

Time to plead—compare sec. 432, ante.

CHAPTER IV.

PROVISIONAL REMEDIES IN JUSTICES' COURTS.

Article I. Arrest and Bail, §§ 861-865.

II. Attachment, §§ 866-869.

III. Claim and Delivery of Personal Property, § 870.

ARTICLE I.

ARREST AND BAIL.

§ 861. Order of arrest and arrest of defendant.

§ 862. Affidavit and undertaking for order of arrest.

§ 863. A defendant arrested must be taken before the justice immediately.

§ 864. The officer must give notice to the plaintiff of arrest.

§ 865. The officer must detain the defendant.

§ 861 Order of arrest and arrest of defendant. An order to arrest the defendant may be indorsed on a summons issued by the justice, and the defendant may be arrested thereon by the sheriff or constable, at the time of serving the summons and brought before the justice, and there detained until duly discharged, in the following cases:

1. In an action for the recovery of money or damages, on a cause of action arising upon contract, express or im-

plied, when the defendant is about to depart from the state, with intent to defraud his creditors;

2. In an action for a fine or penalty, or for money or property embezzled or fraudulently misapplied, or converted to his own use by one who received it in a fiduciary capacity;

3. When the defendant has been guilty of a fraud in contracting the debt or incurring the obligation for which the action is brought;

4. When the defendant has removed, concealed, or disposed of his property, or is about to do so, with intent to defraud his creditors.

But no female can be arrested in any action. En. March 11, 1872.

Cal. Rep. Cit. 86, 71.

Prac. Act, sec. 544. En. April 29, 1851.

Arrest and bail: Secs. 478 et seq.

Mesne and final process of justices' courts may be issued to any part of the county: Secs. 94, 106.

§ 862. Affidavit and undertaking for order of arrest. Before an order for an arrest can be made, the party applying must prove to the satisfaction of the justice, by the affidavit of himself or some other person, the facts upon which the application is founded. The plaintiff must also execute and deliver to the justice a written undertaking in the sum of three hundred dollars, with sufficient sureties, to the effect that the plaintiff will pay all costs that may be adjudged to the defendant, and all damages which he may sustain by reason of the arrest, if the same be wrongful, or without sufficient cause, not exceeding the sum specified in the undertaking. En. March 11, 1872. Am'd. 1873-4, 334.

Prac. Act, sec. 545. En. April 29, 1851.

Affidavit and undertaking for arrest: Compare ante, secs. 481, 482.

Qualification of sureties: Post, sec. 1057.

§ 863. A defendant arrested must be taken before the justice immediately. The defendant, immediately, upon being arrested, must be taken to the office of the justice who made the order, and if he is absent or unable to try

the action, or if it appears to him by the affidavit of defendant, that he is a material witness in the action, the officer must immediately take the defendant before another justice of the township or city, if there is another, and if not, then before the justice of an adjoining township, who must take jurisdiction of the action, and proceed thereon, as if the summons had been issued and the order of arrest made by him. En. March 11, 1872.

Cal. Rep. Cit. 95, 74; 141, 321.

Prac. Act, sec. 546. En. April 29, 1851.

Prac. Act, sec. 550. En. April 29, 1851.

§ 864. The officer must give notice to the plaintiff of arrest. The officer making the arrest must immediately give notice thereof to the plaintiff, or his attorney or agent, and indorse on the summons, and subscribe a certificate, stating the time of serving the same, the time of the arrest, and of his giving notice to the plaintiff. En. March 11, 1872.

Prac. Act, sec. 547. En. April 29, 1851.

§ 865. The officer must detain the defendant. The officer making the arrest must keep the defendant in custody until he is discharged by order of the justice. En. March 11, 1872.

Cal. Rep. Cit. 86, 71.

Prac. Act, sec. 548. En. April 29, 1851.

ARTICLE II.

ATTACHMENT.

§ 866. Writ of attachment shall issue upon affidavit.

§ 867. Undertaking on attachment must be required.

§ 868. Writ of attachment, substance of. Officer may take an undertaking instead of levying.

§ 869. Certain provisions apply to all attachments in justices' courts.

§ 866. Writ of attachment shall issue upon affidavit. A writ to attach the property of the defendant must be issued by the justice at the time of, or after issuing summons and before answer, on receiving an affidavit by or on behalf of the plaintiff, showing the same facts, as are required to be shown by the affidavit specified in section five hundred and thirty-eight of this code. En. March 11, 1872.

Cal. Rep. Cit. 122, 148.

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Prac. Act, sec. 551. En. April 29, 1851. Am'd. 1858, 154; 1860, 304.

Cal. Rep. Cit. 34, 646.

Prac. Act, sec. 552. En. April 29, 1851. Am'd. 1858, 154. Attachment, generally: Ante, secs. 537 et seq.

Mesne and final process of justices' courts may be issued to any part of the county: Ante, secs. 94, 106.

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§ 867. Undertaking on attachment must be required. Before issuing the writ, the justice must require a written undertaking on the part of the plaintiff, with two or more sufficient sureties, in a sum not less than fifty, nor more than three hundred dollars, to the effect that if the defendant recover judgment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the attachment not exceeding the sum specified in the undertaking. En. March 11, 1872.

Prac. Act, sec. 553. En. April 29, 1851. Am'd. 1858, 154; 1860, 304; 1871-2, 75.

Cal. Rep. Cit. 34, 646.

Undertaking on attachment, generally: Ante, sec. 539.

§ 868. Writ of attachment, substance of. Officer may take an undertaking instead of levying. The writ may be directed to the sheriff or any constable of the county in which such justice court is situate, and must require him to attach and safely keep all the property of the defendant within his county, not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which must be stated in conformity with the complaint, unless the defendant give him security, by the undertaking of two sufficient sureties, in an amount sufficient to satisfy such demand, besides costs; in which case, to take such undertaking. Several writs may be issued at the same time to the sheriffs of different counties; provided, that where a writ of attachment issued by a justice of the peace is to be served out of the county in which it was issued, the writ of attachment shall have attached to it a certificate under seal, by the county clerk of such county, to the effect that the person issuing the same was an acting justice of the peace of said county, at the date of the writ. En. March 11, 1872. Am'd. 1905, 208.

Prac. Act, sec. 554. En. April 29, 1851.
Contents of writ: Compare sec. 540, ante.

§ 869. Certain provisions apply to all attachments in justices' courts. The sections of this code from section five hundred and forty-one to section five hundred and fifty-nine, both inclusive, are applicable to attachments issued in justices' courts, the word "constable" being substituted for the word "sheriff," whenever the writ is directed to a constable, and the word "justice" being substituted for the word "judge." En. March 11, 1872.

Prac. Act, sec. 555. En. April 29, 1851.

§§ 541-559. Sec. 541, property attachable. Secs. 542, 543, property, how sheriff attaches. Sec. 544, garnishee's liability. Sec. 545, examination of defendant and garnishee. Sec. 546, inventory, return, etc. Sec. 547, perishables. Sec. 548, other property, immediate sale of. Sec. 549, claim by third person. Sec. 550, realization of attached property after judgment for plaintiff. Sec. 551, collecting balance by sheriff. Sec. 552, proceedings if execution unsatisfied. Sec. 553, effect of judgment for defendant. Secs. 554-558, discharge of attachment. Sec. 559, sheriff's return. Releasing attachment.

ARTICLE III.

CLAIM AND DELIVERY OF PERSONAL PROPERTY.

§ 870. How claim and delivery enforced.

§ 870. How claim and delivery enforced. In an action to recover possession of personal property, the plaintiff may, at the time of issuing summons, or at any time thereafter before answer, claim the delivery of such property to him; and the sections of this code, from section five hundred and ten to section five hundred and twenty-one, both inclusive, are applicable to such claim when made in justices' courts, the powers therein given and duties imposed on sheriffs being extended to constables, and the word "justice" substituted for "judge." En. March 11, 1872.

Cal. Rep. Cit. 106, 351.

Prac. Act, sec. 556. En. April 29, 1851.

Prac. Act, sec. 557. En. April 29, 1851.

Prac. Act, sec. 558. En. April 29, 1851.
Prac. Act, sec. 559. En. April 29, 1851.
Prac. Act, sec. 560. En. April 29, 1851.
Prac. Act, sec. 561. En. April 29, 1851.
Prac. Act, sec. 562. En. April 29, 1851.
Prac. Act, sec. 563. En. April 29, 1851.
Prac. Act, sec. 564. En. April 29, 1851.
Prac. Act, sec. 565. En. April 29, 1851.
Prac. Act, sec. 566. En. April 29, 1851.
Prac. Act, sec. 568. En. April 29, 1851.
Prac. Act, sec. 569. En. April 29, 1851.
Prac. Act, sec. 592. En. April 29, 1851.
Claim and delivery: Secs. 509 et seq.

§§ 510-521. Sec. 510, affidavit for claim and delivery. Sec. 511, requisition for sheriff to take property claimed. Sec. 512, undertaking by plaintiff. Sec. 513, exception to sureties by defendant. Sec. 514, defendant claiming re-delivery. Sec. 515, justification of defendant's sureties. Sec. 516, qualifications of sureties. Sec. 517, breaking open building, etc. Sec. 518, property, how kept. Sec. 519, claim by third person. Sec. 520, sheriff to file notice, affidavit, etc. Sec. 521 (Rep. March 24; took effect July 1, 1874).

CHAPTER V.

JUDGMENT BY DEFAULT IN JUSTICES' COURTS.

§ 871. Judgment when defendant fails to appear.

§ 872. Judgment against defendant on demurrer.

§ 871. Judgment when defendant fails to appear. If the defendant fail to appear, and to answer or demur within the time specified in the summons, then, upon proof of service of summons, the following proceedings must be had:

1. If the action is based upon a contract, and is for the recovery of money, or damages only, the court must render judgment in favor of plaintiff for the sum specified in the summons.

2. In all other actions the court must hear the evidence offered by the plaintiff, and must render judgment in his

favor for such sum (not exceeding the amount stated in the summons) as appears by such evidence to be just. En. March 11, 1872. Am'd. 1875-6, 100; 1880, 113.

Cal. Rep. Cit. 59, 493; 74, 344; 108, 363. Subd. 1—66, 638; 135, 5.

Default judgment, generally: Ante, sec. 585.

§ 872. Judgment against defendant on demurrer. In the following cases the same proceedings must be had, and judgment must be rendered in like manner, as if the defendant had failed to appear and answer or demur:

If the complaint has been amended, and the defendant fails to answer it as amended, within the time allowed by the court;

2. If the demurrer to the complaint is overruled, and the defendant fails to answer at once;

3. If the demurrer to the answer is sustained, and the defendant fails to amend the answer within the time allowed by the court. En. March 11, 1872.

Cal. Rep. Cit. 109, 617. Subd. 2—135, 5.

Compare sec. 858, ante.

CHAPTER VI.

TIME OF TRIAL AND POSTPONEMENTS IN JUSTICES' COURTS.

§ 873. Time when trial must be commenced.

§ 874. When court may, of its own motion, postpone trial.

§ 875. Postponement by consent.

§ 876. Postponement upon application of a party.

§ 877. No continuance for more than ten days to be granted, unless upon filing of undertaking.

§ 873. Time when trial must be commenced. Unless postponed as provided in this chapter, or unless transferred to another court, the trial of the action must commence at the expiration of one hour from the time specified in the notice mentioned in section 850, and the trial must be continued without adjournment for more than twenty-four hours at any one time, until all the issues therein are disposed of. En. March 11, 1872. Am'd. 1875-6, 100.

Cal. Rep. Cit. 92, 432; 97, 526; 118, 276.

§ 874. When court may, of its own motion, postpone trial. The court may, of its own motion, postpone the trial:

1. For not exceeding one day, if, at the time fixed by law or by an order of the court for the trial, the court is engaged in the trial of another action;

2. For not exceeding two days, if, by an amendment of the pleadings, or the allowance of time to make such amendment or to plead, a postponement is rendered necessary;

3. For not exceeding three days, if the trial is upon issues of fact, and a jury has been demanded. En. March 11, 1872.

Cal. Rep. Cit. Subd. 2—135, 6.

Amendment of pleadings, etc.: Ante, secs. 858, 859.

§ 875. Postponement by consent. The court may, by consent of the parties, given in writing or in open court, postpone the trial to a time agreed upon by the parties. En. March 11, 1872.

Prac. Act, sec. 583. En. April 29, 1851. Am'd. 1854, 63.

Prac. Act, sec. 584. En. April 29, 1851. Am'd. 1854, 63.

§ 876. Postponement upon application of a party. The trial may be postponed upon the application of either party, for a period not exceeding four months:

1. The party making the application must prove, by his own oath or otherwise, that he cannot, for want of material testimony, which he expects to procure, safely proceed to trial, and must show in what respect the testimony expected is material, and that he has used due diligence to procure it, and has been unable to do so;

2. If the application is on the part of the plaintiff, and the defendant is under arrest, a postponement for more than three hours discharges the defendant from custody, but the action may proceed, notwithstanding, and the defendant is subject to arrest on execution, in the same manner as if he had not been discharged;

3. If the application is on the part of a defendant under arrest, before it can be granted he must execute an undertaking, with two or more sufficient sureties, to be approved by, and in a sum to be fixed by the justice, to the effect

that he will render himself amenable to the process of the court during the pendency of the action, and to such as may be issued to enforce the judgment therein; or that the sureties will pay to the plaintiff the amount of any judgment which he may recover in the action, not exceeding the amount specified in the undertaking. On filing the undertaking specified in this subdivision, the justice must order the defendant to be discharged from custody;

4. The party making the application must, if required by the adverse party, consent that the testimony of any witness of such adverse party, who is in attendance, may be then taken by deposition before the justice, and that the testimony so taken may be read on the trial, with the same effect, and subject to the same objections, as if the witness was produced; but the court may require the party making the application to state, upon affidavit, the evidence which he expects to obtain; and if the adverse party thereupon admit that such evidence would be given and that it be considered as actually given on the trial, or offered and overruled as improper, the trial must not be postponed. En. March 11, 1872.

Postponement, generally: Ante, sec. 595; costs of: Post, sec. 1029.

Arrest and bail: Ante, secs. 478 et seq.

§ 877. No continuance for more than ten days to be granted, unless upon filing of undertaking. No adjournment must, unless by consent, be granted for a period longer than ten days, upon the application of either party, except upon condition that such party file an undertaking, in an amount fixed by the justice, with two sureties, to be approved by the justice, to the effect that they will pay to the opposite party the amount of any judgment which may be recovered against the party applying, not exceeding the sum specified in the undertaking. En. March 11, 1872.

Prac. Act, sec. 585. En. April 29, 1851.

CHAPTER VII.

TRIALS IN JUSTICES' COURTS.

- § 878. Issue defined, and the different kinds.
- § 879. Issue of law, how raised.
- § 880. Issue of fact, how raised.
- § 881. Issue of law, how tried.
- § 882. Issue of fact, how tried.
- § 883. Jury, how waived.
- § 884. Either party failing to appear, trial may proceed at request of other party.
- § 885. Challenges to jurors.
- § 886. Manner of pleading a written instrument.
- § 887. If a copy of an instrument be filed, signatures will be deemed admitted, unless denied under oath.

§ 878. Issue defined, and the different kinds. Issues arise upon the pleadings when a fact or conclusion of law is maintained by the one party, and is controverted by the other. They are of two kinds:

1. Of law; and,
2. Of fact. En. March 11, 1872.

Compare this and the next two sections with sections 588-590, ante.

§ 879. Issue of law, how raised. An issue of law arises upon a demurrer to the complaint or answer, or to some part thereof. En. March 11, 1872.

Same as sec. 589, ante.

§ 880. Issue of fact, how raised. An issue of fact arises:

1. Upon a material allegation in the complaint controverted by the answer; and,
2. Upon new matter in the answer, except an issue of law is joined thereon. En. March 11, 1872.

Same as sec. 590, ante.

§ 881. Issue of law, how tried. An issue of law must be tried by the court. En. March 11, 1872.

Compare sec. 591, ante.

§ 882. Issue of fact, how tried. An issue of fact must be tried by a jury, unless a jury is waived, in which case it must be tried by the court. En. March 11, 1872.

Prac. Act, sec. 593. En. April 29, 1851.

Compare sec. 592, ante.

§ 883. Jury, how waived. A jury may be waived:

1. By consent of parties, entered in the docket;
2. By a failure of either party to demand a jury before the commencement of the trial of an issue of fact;
3. By the failure of either party to appear at the time fixed for the trial of an issue of fact. En. March 11, 1872.

Prac. Act, sec. 587. En. April 29, 1851.

Waiver of jury: Compare sec. 631, ante.

§ 884. Either party failing to appear, trial may proceed at request of other party. If either party fails to appear at the time fixed for trial, the trial may proceed at the request of the adverse party. En. March 11, 1872.

Cal. Rep. Cit. 63, 436.

Compare sec. 594, ante.

§ 885. Challenges to jurors. The challenges are either peremptory or for cause. Each party is entitled to three peremptory challenges. Either party may challenge for cause on any grounds set forth in section six hundred and two. Challenges for cause must be tried by the justice. En. March 11, 1872.

Prac. Act, sec. 590. En. April 29, 1851.

Challenges: Compare secs. 601, 602, ante.

§ 886. Manner of pleading a written instrument. When the cause of action or counterclaim arises upon an account or instrument for the payment of money only, the court, at any time before the trial, may, by an order under his hand, require the original to be exhibited to the inspection of, and a copy to be furnished to, the adverse party, at such time as may be fixed in the order; or, if such order is not obeyed, the account or instrument cannot be given in evidence. En. March 11, 1872.

Prac. Act, sec. 576. En. April 29, 1851.

Order for inspection: Post, sec. 1000.

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§ 887. If a copy of an instrument be filed, signatures will be deemed admitted, unless denied under oath. If the plaintiff annex to his complaint, or file with the justice at the time of issuing the summons, the original or a copy of the promissory note, bill of exchange, or other

written obligation for the payment of money, upon which the action is brought, the defendant is deemed to admit the genuineness of the signatures of the makers, indorsers, or assignors thereof, unless he specifically deny the same in his answer, and verify the answer by his oath. En. March 11, 1872.

Prac. Act, sec. 577. En. April 29, 1851. Am'd. 1854, 68.
Compare secs. 447, 448, 853, ante.

CHAPTER VIII.

JUDGMENTS (OTHER THAN BY DEFAULT) IN JUSTICES' COURTS.

- § 889. Judgment by confession.
- § 890. Judgment of dismissal entered in certain cases without prejudice.
- § 891. Judgment upon verdict.
- § 892. Judgment after trial by the court.
- § 893. Judgment when the defendant is subject to arrest.
- § 894. If the sum found due exceeds the jurisdiction of the justice, the excess may be remitted.
- § 895. Offer to compromise before trial.
- § 896. Costs may be included in the judgment.
- § 897. Abstract of judgment.
- § 898. Abstract may be filed and docketed in superior court.
- § 899. Effect of docketing.
- § 900. Judgment not a lien unless abstract is recorded in the recorder's office.

§ 889. Judgment by confession. Judgments upon confession may be entered up in 'any justices' court specified in the confession. En. March 11, 1872.

Prac. Act, sec. 536. En. April 29, 1851.

Confession of judgment, generally: Post, secs. 1132-1135; jurisdiction: Ante, sec. 112, subd. 6.

§ 890. Judgment of dismissal entered in certain cases without prejudice. Judgment that the action be dismissed, without prejudice to a new action, may be entered with costs, in the following cases:

1. When the plaintiff voluntarily dismisses the action before it is finally submitted; or fails to prosecute the action to judgment with reasonable diligence; provided a counterclaim has not been made, or affirmative relief sought by the cross-complaint or answer of the defendant; if a provisional remedy has been allowed, the undertaking must thereupon be delivered by the justice of the peace to the defendant who may have his action thereon;

2. When he fails to appear at the time specified in the summons, or at the time to which the action has been postponed, or within one hour thereafter;

3. When, after a demurrer to the complaint has been sustained, the plaintiff fails to amend it within the time allowed by the court;

4. When the action is brought in the wrong county, or township, or city. En. March 11, 1872. Am'd. 1905, 44.

Cal. Rep. Cit. 106, 592; 106, 593. Subd. 3—97, 522. Subd. 4—141, 267.

Prac. Act, sec. 586. En. April 29, 1851. Am'd. 1867-8, 552.

Prac. Act, sec. 591. En. April 29, 1851.

Dismissal: Compare sec. 581, ante.

§ 891. Judgment upon verdict. When a trial by jury has been had, judgment must be entered by the justice, at once, in conformity with the verdict. En. March 11, 1872.

Cal. Rep. Cit. 68, 411; 102, 180.

Prac. Act, sec. 594. En. April 29, 1851. Am'd. 1854, 68; 1863, 690.

Entry of judgment, generally: Ante, sec. 664; as affecting appeals: Post, sec. 939.

§ 892. Judgment after trial by the court. When the trial is by the court, judgment must be entered at the close of the trial. En. March 11, 1872.

Cal. Rep. Cit. 88, 559; 97, 525; 102, 180; 118, 276; 133, 319.

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§ 893. Judgment when the defendant is subject to arrest. The judgment in justices' courts must be entered substantially in the form required by section six hundred and sixty-seven of this code. When the judgment is rendered in a case where the defendant is subject to arrest and imprisonment thereon, the fact that the defendant is so subject, must be stated in the judgment. En. March 11, 1872. Am'd. 1873-4, 334.

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Prac. Act, sec. 597. En. April 29, 1851.

Final process may be issued to any part of the county: Ante, secs. 94, 106.

§ 894. If the sum found due exceeds the jurisdiction of the justice, the excess may be remitted. When the amount found due to either party exceeds the sum for

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which the justice is authorized to enter judgment, such party may remit the excess, and judgment may be rendered for the residue. En. March 11, 1872.

Cal. Rep. Cit. 147, 107.

Prac. Act, sec. 595. En. April 29, 1851.

Limit, three hundred dollars: Ante, sec. 112.

§ 895. Offer to compromise before trial. If the defendant, at any time before the trial, offer, in writing, to allow judgment to be taken against him for a specified sum, the plaintiff may immediately have judgment therefor, with the costs then accrued; but if he do not accept such offer before the trial, and fail to recover in the action a sum in excess of the offer, he cannot recover costs, but costs must be adjudged against him, and, if he recover, be deducted from his recovery. The offer and failure to accept it cannot be given in evidence nor affect the recovery, otherwise than as to costs. En. March 11, 1872. Am'd. 1877-8, 103.

Prac. Act, sec. 596. En. April 29, 1851.

Offer to compromise: Compare sec. 997, post.

§ 896. Costs may be included in the judgment. The justice must tax and include in the judgment the costs allowed by law to the prevailing party. En. March 11, 1872.

Cal. Rep. Cit. 102, 180.

Prac. Act, sec. 598. L.L. April 29, 1851.

§ 897. Abstract of judgment. The justice, on the demand of a party in whose favor judgment is rendered, must give him an abstract of the judgment in substantially the following form (filling blanks according to the facts):

State of California, ——— county, (or city and county). ———, plaintiff, v. ———, defendant. In justices' court, before ———, justice of the peace, ——— township (or city, or city and county), ———, 18— (inserting date of abstract). Judgment entered for plaintiff (or defendant), for \$——, on the ——— day of ———. I certify that the foregoing is a correct abstract of a judgment rendered in said action in my court—or (as the case may be) in the court of ———, justice of the peace, as appears by his docket, now in my possession, as his successor in office. ———, Justice of the Peace. En. March 11, 1872. Am'd. 1880, 19.

Cal. Rep. Cit. 52, 401.

Prac. Act, sec. 599. En. April 29, 1851. Am'd. 1854, 69.
Cal. Rep. Cit. 26, 156; 27, 371; 52, 402.

§ 898. Abstract may be filed and docketed in superior court. The abstract may be filed in the office of the county clerk of the county in which the judgment was rendered, and the judgment docketed in the judgment docket of the superior court thereof. The time of the receipt of the abstract by the clerk must be noted by him thereon, and entered in the docket. En. March 11, 1872. Am'd. 1880, 20.

Docketing, generally: Ante, sec. 671.

Recording transcript: Ante, sec. 674.

§ 899. Effect of docketing. From the time of docketing in the county clerk's office, execution may be issued thereon by the county clerk to the sheriff of any county in the state, other than the county in which the judgment was rendered, in the same manner and with like effect as if issued on a judgment of the superior court. En. March 11, 1872. Am'd. 1880, 20.

Cal. Rep. Cit. 74, 107.

Execution, generally: Ante, secs. 681 et seq.

Docketing: Ante, sec. 671.

Recording: Ante, sec. 674.

§ 900. Judgment not a lien unless abstract is recorded in the recorder's office. A judgment rendered in a justice's court creates no lien upon any lands of the defendant, unless such an abstract is filed in the office of the recorder of the county in which the lands are situated. When so filed, and from the time of filing, the judgment becomes a lien upon all the real property of the judgment debtor, not exempt from execution, in such county, owned by him at the time, or which he may afterwards, and before the lien expires, acquire. The lien continues for two years, unless the judgment be previously satisfied. En. March 11, 1872. Am'd. 1880, 114.

Cal. Rep. Cit. 52, 401; 111, 486.

Lien, extent and duration of: Compare sec. 674, ante.

CHAPTER IX.

APPEALS TO SUPREME COURT.

- § 901. Execution may issue at any time within five years.
- § 902. Execution, contents of.
- § 903. Renewal of execution.
- § 904. Duty of officer receiving execution.
- § 905. Proceedings supplementary to execution.

§ 901. Execution may issue at any time within five years. Execution for the enforcement of a judgment of a justice's court may be issued by the justice who entered the judgment, or his successor in office, on the application of the party entitled thereto, at any time within five years from the entry of judgment. En. March 11, 1872.

Cal. Rep. Cit. 55, 533.

Prac. Act, sec. 600. En. April 29, 1851.

Cal. Rep. Cit. 8, 513; 26, 157.

After five years, generally: Sec. 685.

Execution, generally: Secs. 681 et seq.

Final process may be issued to any part of the county: Ante, secs. 94, 106.

§ 902. Execution, contents of. The execution must be directed to the sheriff or to a constable of the county, and must be subscribed by the justice and bear date the day of its delivery to the officer. It must intelligibly refer to the judgment, by stating the names of the parties, and the name of the justice before whom, and of the county and the township or city where, and the time when, it was rendered; the amount of judgment, if it be for money; and, if less than the whole is due, the true amount due thereon. It must contain, in like cases, similar directions to the sheriff or constable, as are required by the provisions of title nine, part two, of this code, in an execution to the sheriff. En. March 11, 1872.

Cal. Rep. Cit. 138, 647; 138, 648; 138, 649.

Prac. Act, sec. 601. En. April 29, 1851.

Cal. Rep. Cit. 82, 188.

Compare secs. 681 et seq.

§ 903. Renewal of execution. An execution may, at the request of the judgment creditor, be renewed before

C. C. P., 1906, new.

§ 901a. The court, or any justice thereof, may stay the execution of any judgment, including any judgment in a case of forcible entry or unlawful detainer, for a period not exceeding ten days. [In effect June 14, 1906.]

the expiration of the time fixed for its return, by the word "renewed," written thereon, with the date thereof, and subscribed by the justice. Such renewal has the effect of an original issue, and may be repeated as often as necessary. If an execution is returned unsatisfied, another may be afterward issued. En. March 11, 1872.

Cal. Rep. Cit. 107, 390.

§ 904. **Duty of officer receiving execution.** The sheriff or constable to whom the execution is directed must execute the same in the same manner as the sheriff is required by the provisions of title nine, part two, of this code, to proceed upon executions directed to him; and the constable, when the execution is directed to him, is vested for that purpose with all the powers of the sheriff. En. March 11, 1872.

Prac. Act, sec. 602. En. April 29, 1851. Am'd. 1854, 69.

Cal. Rep. Cit. 19, 146; 28, 123.

Execution of writ: Compare, ante, secs. 691 et seq.; and generally: See secs. 688 et seq., ante.

§ 905. **Proceedings supplementary to execution.** The sections of this code, from seven hundred and fourteen to seven hundred and twenty-one, both inclusive, are applicable to justices' courts, the word "constable" being substituted, to that end, for the word "sheriff," and the word "justice" for the word "judge." En. March 11, 1872. §905 Am'd. p. 469

Cal. Rep. Cit. 47, 132; 133, 317.

Proceedings supplementary to execution: Ante, secs. 714-721.

CHAPTER X.

CONTEMPTS IN JUSTICES' COURTS.

§ 906. **Contempts a justice may punish for.**

§ 907. **Proceedings for contempts.**

§ 908. **Same.**

§ 909. **Punishments for contempts.**

§ 910. **The conviction must be entered in the docket.**

§ 906. **Contempts a justice may punish for.** A justice may punish as for contempt, persons guilty of the following acts, and no other: §906 Am'd. p. 469

1. Disorderly, contemptuous, or insolent behavior to-

wards the justice while holding the court, tending to interrupt the due course of a trial or other judicial proceeding;

2. A breach of the peace, boisterous conduct, or violent disturbance in the presence of the justice, or in the immediate vicinity of the court held by him, tending to interrupt the due course of a trial or other judicial proceeding;

3. Disobedience or resistance to the execution of a lawful order or process, made or issued by him;

4. Disobedience to a subpoena duly served, or refusing to be sworn or to answer as a witness;

5. Rescuing any person or property in the custody of an officer by virtue of an order or process of the court held by him. En. March 11, 1872.

Prac. Act, sec. 616. En. April 29, 1851.

Contempts, generally: Post, secs. 1209 et seq.

Courts and judicial officers, powers of: Ante, sec. 128, 177-179.

§ 907. Proceedings for contempts. When a contempt is committed in the immediate view and presence of the justice, it may be punished summarily; to that end an order must be made reciting the facts, as they occurred, and adjudging that the person proceeded against is thereby guilty of contempt, and that he be punished as therein prescribed. En. March 11, 1872.

Prac. Act, sec. 617. En. April 29, 1851.

Compare sec. 1211, post.

§ 908. Same. When the contempt is not committed in the immediate view and presence of the justice, a warrant of arrest may be issued by such justice, on which the person so guilty may be arrested and brought before the justice immediately, when an opportunity to be heard in his defense, or excuse, must be given. The justice may, thereupon, discharge him, or may convict him of the offense. En. March 11, 1872.

Compare secs. 1212 et seq., post.

§ 909. Punishments for contempts. A justice may punish for contempts by fine or imprisonment, or both; such fine not to exceed in any case one hundred dollars, and such imprisonment one day. En. March 11, 1872.

Cal. Rep. Cit. 47, 132; 47, 133.

§ 910. The conviction must be entered in the docket. The conviction, specifying particularly the offense and the judgment thereon, must be entered by the justice in his docket. En. March 11, 1872.

Prac. Act, sec. 618. En. April 29, 1851.

CHAPTER XI.

DOCKETS OF JUSTICES.

- § 911. Docket, what to contain.
- § 912. Entries therein prima facie evidence of the fact.
- § 913. An index to the docket must be kept.
- § 914. Dockets must be delivered by justice to his successor, or to county clerk.
- § 915. Proceedings when office becomes vacant, and before a successor is appointed.
- § 916. A justice may issue execution or other process upon the docket of his predecessor.
- § 917. Justice is successor of prior holder.
- § 918. Designation of succeeding justice.

§ 911. Docket, what to contain. Every justice must keep a book, denominated a "docket," in which he must enter:

1. The title of every action or proceeding.
2. The object of the action or proceeding; and if a sum of money be claimed, the amount thereof.
3. The date of the summons, and the time of its return; and if an order to arrest the defendant be made, or a writ of attachment be issued, a statement of the fact.
4. The time when the parties, or either of them, appear, or their nonappearance, if default be made; a minute of the pleadings and motions; if in writing, referring to them; if not in writing, a concise statement of the material parts of the pleading.
5. Every adjournment, stating on whose application and to what time.
6. The demand for a trial by jury, when the same is made, and by whom made, the order for the jury, and the time appointed for the return of the jury and for the trial.
7. The names of the jurors, who appear and are sworn, and the names of all witnesses sworn, and at whose request.

8. The verdict of the jury, and when received; if the jury disagree and are discharged, the fact of such disagreement and discharge.

9. The judgment of the court, specifying the costs included, and the time when rendered.

10. The issuing of the execution, when issued and to whom, the renewals thereof, if any, and when made, and a statement of any money paid to the justice, when and by whom.

11. The receipt of a notice of appeal, if any be given, and of the appeal bond, if any be filed. En. March 11, 1872. Am'd. 1873-4, 334.

Cal. Rep. Cit. 74, 345; 85, 134; 124, 360; 133, 487.

Prac. Act, sec. 604. En. April 29, 1851. Am'd. 1855, 197.

Cal. Rep. Cit 31, 54; 34, 326.

Docket in justices' court in cities and counties: Ante, sec. 93.

§ 912. Entries therein prima facie evidence of the fact. The several particulars of the last section specified must be entered under the title of the action to which they relate, and (unless otherwise in this title provided) at the time when they occur. Such entries in a justice's docket, or a transcript thereof, certified by the justice, or his successor in office, are prima facie evidence of the facts so stated. En. March 11, 1872. Am'd. 1880, 20.

Cal. Rep. Cit. 85, 134; 87, 631; 115, 85; 124, 360.

Prac. Act, sec. 605. En. April 29, 1851.

Cal. Rep. Cit. 31, 54; 34, 326.

Prima facie evidence: Post, sec. 1833.

§ 913. An index to the docket must be kept. A justice must keep an alphabetical index to his docket, in which must be entered the names of the parties to each judgment, with a reference to the page of entry. The names of the plaintiffs must be entered in the index, in the alphabetical order of the first letter of the family name. En. March 11, 1872.

Prac. Act, sec. 606. En. April 29, 1851.

§ 914. Dockets must be delivered by justice to his successor, or to county clerk. Every justice of the peace,

upon the expiration of his term of office, must deposit with his successor his official dockets and all papers filed in his office, as well his own as those of his predecessors, or any other which may be in his custody to be kept as public records. En. March 11, 1872.

Prac. Act, sec. 607. En. April 29, 1851. Am'd. 1863, 232; 1869-70, 223.

§ 915. Proceedings when office becomes vacant, and before a successor is appointed. If the office of a justice become vacant by his death or removal from the township or city, or otherwise, before his successor is elected and qualified, the docket and papers in possession of such justice must be deposited in the office of some other justice in the township, to be by him delivered to the successor of such justice. If there is no other justice in the township, then the docket and papers of such justice must be deposited in the office of the county clerk of the county, to be by him delivered to the successor in office of the justice. En. March 11, 1872.

§ 916. A justice may issue execution or other process upon the docket of his predecessor. Any justice with whom the docket of his predecessor or of any other justice is deposited, has and may exercise over all actions and proceedings entered in such docket, the same jurisdiction as if originally commenced before him. In case of the creation of a new country, or the change of the boundary between two counties, any justice into whose hands the docket of a justice formerly acting as such within the same territory, may come, is, for the purposes of this section, considered the successor of such former justice. En. March 11, 1872.

Prac. Act, sec. 608. En. April 29, 1851. Am'd. 1855, 304; 1863, 232.

§ 917. Justice is successor of prior holder. The justice elected to fill a vacancy is the successor of the justice whose office became vacant before the expiration of a full term. When a full term expires, the same or another person elected to take office in the same township or city, from that time is the successor. En. March 11, 1872.

Prac. Act, sec. 609. En. April 29, 1851.

§ 918. Designation of succeeding justice. When two or more justices are equally entitled under the last section, to be deemed the successors in office of the justice, a judge of the superior court must, by a certificate subscribed by him and filed in the office of the county clerk, designate which justice is the successor of a justice going out of office, or whose office has become vacant. En. March 11, 1872. Am'd. 1880, 20.

Prac. Act, sec. 610. En. April 29, 1851.

CHAPTER XII.

GENERAL PROVISIONS RELATING TO JUSTICES' COURTS.

§ 919. Justices may issue subpoenas and final process to any part of the county.

§ 920. Blanks must be filled in all papers issued by a justice, except subpoenas.

§ 921. Justices to receive all moneys collected and pay same to parties.

§ 922. In case of disability of justice another justice may attend on his behalf.

§ 923. Justices may require security for costs.

§ 924. Who entitled to costs.

§ 925. What provisions of code applicable to justices' courts.

§ 926. Deposit in lieu of undertaking.

§ 919. Justices may issue subpoenas and final process to any part of the county. Justices of the peace may issue subpoenas in any action or proceeding in the courts held by them, and final process on any judgment recovered therein, to any part of the county. En. March 11, 1872.

Prac. Act, sec. 619. En. April 29, 1851. Am'd. 1863, 496.

Final process, to any part of the county: Ante, secs. 94, 106.

§ 920. Blanks must be filled in all papers issued by a justice, except subpoenas. The summons, execution, and every other paper made or issued by a justice, except a subpoena, must be issued without a blank left to be filled by another, otherwise it is void. En. March 11, 1872.

Cal. Rep. Cit. 138, 647; 138, 649; 138, 650.

Prac. Act, sec. 611. En. April 29, 1851.

§ 921. Justices to receive all moneys collected and pay same to parties. Justices of the peace must receive from the sheriff or constables of their county, all moneys col-

lected on any process or order issued from their courts respectively, and must pay the same, and all moneys paid to them in their official capacity, over to the parties entitled or authorized to receive them, without delay. En. March 11, 1872. Am'd. 1880, 20.

Prac. Act, sec. 633. En. April 29, 1851.

Cal. Rep. Cit. 25, 538.

§ 922. In case of disability of justice another justice may attend on his behalf. In case of the sickness or other disability, or necessary absence of a justice, on a return of a summons, or at the time appointed for a trial, another justice of the same township or city may, at his request, attend in his behalf, and thereupon is vested with the power, for the time being, of the justice before whom the summons was returnable. In that case, the proper entry of the proceedings before the attending justice, subscribed by him, must be made in the docket of the justice before whom the summons was returnable. If the case is adjourned, the justice before whom the summons was returnable may resume jurisdiction. En. March 11, 1872.

Prac. Act, sec. 612. En. April 29, 1851.

§ 923. Justices may require security for costs. Justices may, in all cases, require a deposit of money or an undertaking, as security for costs of court, before issuing a summons. En. March 11, 1872.

Prac. Act, sec. 634. En. April 29, 1851.

Prepayment of fees: Ante, sec. 91.

§924
Am'd.
p. 469 § 924. Who entitled to costs. The prevailing party in justices' courts is entitled to costs of the action, and also of any proceedings taken by him in aid of an execution issued upon any judgment recovered therein. En. March 11, 1872. Am'd. 1873-4, 335.

Prac. Act, sec. 631. En. April 29, 1851. Am'd. 1854, 71; 1885, 251.

Costs: Ante, sec. 896.

§ 925. What provisions of code applicable to justices' courts. Justices' courts being courts of peculiar and limited jurisdiction, only those provisions of this code which are, in their nature, applicable to the organization, powers,

and course of proceedings in justices' courts, or which have been made applicable by special provisions in this title, are applicable to justices' courts and the proceedings therein. En. March 11, 1872.

Cal. Rep. Cit. 47, 133, 74, 343; 114, 373.

Prac. Act, sec. 603. En. April 29, 1851. Am'd. 1853, 280. 1854, 70; 1854, 73.

Prac. Act, sec. 635. En. April 29, 1851. Am'd. 1860, 306.

Peculiar and limited jurisdiction: Ante, secs. 112-114.

§ 926. Deposit in lieu of undertaking. In all civil cases arising in justices' courts, wherein an undertaking is required as prescribed in this code, the plaintiff or defendant may deposit with said justice a sum of money in United States gold coin equal to the amount required by the said undertaking, which said sum of money shall be taken as security in place of said undertaking. En. Stats. 1877-8, 103.

Cal. Rep. Cit. 147, 173; 147, 174.

TITLE XII.

PROCEEDINGS IN CIVIL ACTIONS IN POLICE COURTS.

§ 929. How commenced.

§ 930. Summons must issue on filing complaint.

§ 931. Defendant may plead orally or in writing.

§ 932. Trial by jury, when defendant is entitled to.

§ 933. Proceedings to be conducted as in justices' courts.

§ 929. How commenced. Civil actions in police courts are commenced by filing a complaint, setting forth the violation of the ordinance complained of, with such particulars of time, place, and manner of violation as to enable the defendant to understand distinctly the character of the violation complained of, and to answer the complaint. The ordinance may be referred to by its title. The complaint must be verified by the oath of the party complaining, or of his attorney or agent. En. March 11, 1872.

Cal. Rep. Cit. 56, 148.

Prac. Act, sec. 636. En. April 29, 1851.

Jurisdiction of police court: See Pol. Code, secs. 4426, 4427.

Provisions relating to police judges: See Pol. Code, secs. 4424-4432.

§ 930. Summons must issue on filing complaint. Immediately after filing the complaint, a summons must be issued, directed to the defendant, and returnable either immediately or at any time designated therein, not exceeding four days from the date of its issuing. En. March 11, 1872.

Cal. Rep. Cit. 56, 148; 127, 540.

Prac. Act, sec. 637. En. April 29, 1851.

§ 931. Defendant may plead orally or in writing. On the return of the summons the defendant may answer the complaint. The answer may be oral or in writing, and immediately thereafter the case must be tried, unless, for good cause shown, an adjournment is granted. En. March 11, 1872.

Prac. Act, sec. 638. En. April 29, 1851.

§ 932. Trial by jury, when defendant is entitled to. In all actions for violation of an ordinance, where the fine, forfeiture, or penalty imposed by the ordinance is less than fifty dollars, the trial must be by the court. In actions where the fine, forfeiture, or penalty imposed by the ordinance is over fifty dollars, the defendant is entitled to a trial by jury. En. March 11, 1872.

Prac. Act, sec. 639. En. April 29, 1851.

§ 933. Proceedings to be conducted as in justices' courts. All proceedings in civil actions in police courts must, except as in this title otherwise provided, be conducted in the same manner as civil actions in justices' courts. En. March 11, 1872.

Cal. Rep. Cit. 51, 500; 56, 148; 95, 380.

Prac. Act, sec. 641. En. April 29, 1851.

Civil proceedings in justices' courts: Secs. 832-926.

Disqualification of police judge, calling in of justice of the peace: See Pol. Code, sec. 4428.

TITLE XIII.

OF APPEALS IN CIVIL ACTIONS.

Chapter I. Appeals in General, §§ 936-959.

II. Appeals to Supreme Court, §§ 963-966.

III. Appeals to Superior Courts, §§ 974-980.

CHAPTER I.

APPEALS IN GENERAL.

- § 936. Judgment and orders may be reviewed.
- § 937. Orders made out of court, without notice, may be reviewed by the judge.
- § 938. Party aggrieved may appeal. Names of parties.
- § 939. Within what time appeal may be taken.
- § 940. Appeal, how taken.
- § 941. Undertaking or deposit on appeal.
- § 942. Undertaking on appeal from a money judgment.
- § 943. Appeal from a judgment for delivery of documents.
- § 944. Appeal from a judgment directing execution of a conveyance, etc.
- § 945. Undertaking on appeal concerning real property.
- § 946. Stay of proceedings. The security on appeal may be limited in the case of an executor, etc.
- § 947. Undertaking may be in one instrument or several.
- § 948. Justification of sureties on undertaking on appeal.
- § 949. Undertakings in cases not specified.
- § 950. What papers to be used on an appeal from the judgment.
- § 951. What papers used on appeals from orders, except orders granting or refusing new trials.
- § 952. What papers to be used on an appeal from an order granting or refusing a new trial.
- § 953. Copies and undertakings, how certified.
- § 954. When an appeal may be dismissed. When not.
- § 955. Effect of dismissal.
- § 956. What may be reviewed on appeal from judgment.
- § 957. Remedial powers of an appellate court.
- § 958. On judgment on appeal, remittitur must be certified to the clerk of the court below.
- § 959. Provisions of this chapter not applicable to appeals to superior courts.

Gen. Cit. to Chap.—Cal. Rep. Cit. 101, 199; 114, 214; 119, 438.

§ 936. Judgment and orders may be reviewed. A judgment or order in a civil action, except when expressly made final by this code, may be reviewed as prescribed in this title, and not otherwise. En. March 11, 1872.

Cal. Rep. Cit. 54, 520; 61, 194; 68, 338; 72, 192; 84, 9; 84, 488; 90, 327; 119, 439; 119, 440; 133, 108; 140, 356.

Prac. Act, sec. 333. En. April 29, 1851. Am'd. 1854, 64.
Cal. Rep. Cit. 3, 249; 8, 301; 29, 462.

Prac. Act, sec. 338. En. April 29, 1851. Am'd. 1863, 644.
Cal. Rep. Cit. 8, 323; 8, 619; 15, 356; 17, 514; 25, 485;
25, 487; 25, 488; 25, 514; 25, 515; 27, 410; 27, 474;
28, 240; 28, 262; 28, 419; 30, 184; 30, 221; 32, 320;
32, 323; 41, 442; 41, 634; 45, 109; 47, 427; 47, 641.

Prac. Act, sec. 339. En. April 29, 1851. Am'd. 1855, 303;
1863, 644.

Cal. Rep. Cit. 8, 323; 8, 619; 9, 210; 28, 240; 28, 262.

Prac. Act, sec. 340. En. April 29, 1851.

Prac. Act, sec. 341. En. April 29, 1851.

Cal. Rep. Cit. 8, 619; 28, 262.

Prac. Act, sec. 342. En. April 29, 1851. Am'd. 1864, 247.

Cal. Rep. Cit. 8, 619; 45, 44.

Prac. Act, sec. 343. En. April 29, 1851. Am'd. 1854, 64.

Cal. Rep. Cit. 17, 514; 22, 362; 28, 163; 33, 554; 33, 678;
41, 442; 41, 443; 45, 44; 45, 90.

Prac. Act, sec. 344. En. April 29, 1851.

Cal. Rep. Cit. 24, 448; 28, 297.

Judgments and orders, appeal from: Sec. 939.

§ 937. Orders made out of court, without notice, may be reviewed by the judge. An order made out of court, without notice to the adverse party, may be vacated or modified without notice, by the judge who made it; or may be vacated or modified on notice, in the manner in which other motions are made. En. March 11, 1872.

Cal. Rep. Cit. 68, 401; 72, 271; 72, 272; 72, 273; 72, 275;
72, 276; 72, 552; 145, 571; 145, 572.

Prac. Act, sec. 334. En. April 29, 1851.

Cal. Rep. Cit. 9, 19; 12, 448; 33, 390; 33, 391; 72, 373;
72, 276.

Orders, generally: Secs. 1003 et seq.

§ 938. Party aggrieved may appeal. Names of parties. Any party aggrieved may appeal in the cases prescribed in this title. The party appealing is known as the appellant, and the adverse party as the respondent. En. March 11, 1872.

Cal. Rep. Cit. 53, 745; 55, 311; 56, 626; 73, 96; 79, 249;
83, 422; 83, 564; 83, 565; 88, 49; 98, 605; 102, 260;
117, 239; 118, 503; 127, 452; 139, 238; 144, 506; 144,
507; 144, 508; 147, 608.

Prac. Act, sec. 335. En. April 29, 1851.

Cal. Rep. Cit. 38, 640.

Death of party, effect of: Ante, sec. 385.

§939
Am'd.
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§ 939. Within what time appeal may be taken. An appeal may be taken:

1. From a final judgment in an action or special proceeding commenced in the court in which the same is rendered, within six months after the entry of judgment. But an exception to the decision or verdict, on the ground that it is not supported by the evidence, cannot be reviewed on an appeal from the judgment, unless the appeal is taken within sixty days after the rendition of the judgment;

2. From a judgment rendered on an appeal from an inferior court, within ninety days after the entry of such judgment;

3. From an order granting or refusing a new trial; from an order granting or dissolving an injunction; from an order refusing to grant or dissolve an injunction; from an order appointing a receiver; from an order dissolving or refusing to dissolve an attachment; from an order granting or refusing to grant a change of the place of trial; from any special order made after final judgment; from an interlocutory judgment, order or decree hereafter made or entered in any action to redeem real or personal property from a mortgage thereof, or lien thereon determining such right to redeem and ordering an accounting; from an interlocutory judgment in actions for partition of real property; and from an order confirming, changing, modifying, or setting aside the report, in whole or in part, of the referees in actions for partition of real property in the cases mentioned in section seven hundred and sixty-three of this code, within sixty days after the order of [or] interlocutory judgment is made and entered in the minutes of the court, or filed with the clerk. En. March 11, 1872. Am'd. 1880, 61; 1897, 55; 1899, 7.

Cal. Rep. Cit. 49, 108; 52, 652; 60, 421; 64, 611; 66, 137; 67, 200; 69, 204; 72, 193; 80, 169; 81, 215; 84, 532; 84, 533; 89, 521; 90, 327; 108, 454; 110, 174; 116, 72; 118, 484; 118, 485; 119, 440; 120, 236; 133, 248; 137, 308; 137, 309; 137, 310; 137, 361; 137, 371; 138, 690; 138, 726; 143, 495; 146, 325. Subd. 1—46, 546; 52, 623; 53, 745; 54, 519; 55, 45; 60, 572; 61, 334; 65, 221; 71, 302; 72, 192; 75, 497; 76, 354; 77, 526; 80, 168; 81, 246; 84, 488; 84, 531; 87, 412; 89,

100; 90, 5; 99, 178; 106, 150; 107, 52; 111, 2; 111, 635; 113, 374; 117, 228; 119, 159; 122, 156; 123, 510; 127, 523; 128, 141; 129, 46; 129, 201; 131, 325; 133, 108; 140, 664; 145, 117. Subd. 3—52, 77; 53, 26; 53, 632; 57, 634; 62, 545; 63, 233; 64, 611; 65, 221; 65, 501; 71, 400; 71, 518; 77, 611; 91, 356; 99, 410; 101, 584; 106, 145; 119, 57; 125, 16; 127, 419; 129, 46; 130, 181; 130, 509; 131, 279; 132, 325; 132, 341; 133, 108; 133, 365; 134, 122; 137, 56; 139, 259; 140, 356; 145, 147.

Prac. Act, sec. 336. En. April 29, 1851. Am'd. 1854, 64; 1859, 140, 1863, 756; 1866, 706.

Cal. Rep. Cit. 6, 232; 8, 57; 12, 281; 20, 142; 24, 335; 24, 448; 28, 417; 28, 419; 31, 208; 31, 209; 31, 367; 33, 392; 35, 553; 35, 698; 38, 387; 38, 424; 41, 407; 42, 114; 49, 128; 54, 519; 57, 634; 67, 204; 84, 488; 122, 156; 137, 309. Subd. 1—42, 119. Subd. 2—42, 119. Subd. 3—42, 113; 43, 627; 91, 356.

Effect of appeals: See sec. 946, *infra*. As to the record on appeals: See sec. 951, *post*.

Appeals, to supreme court: *Post*, secs. 963-966; to superior court: *Post*, secs. 974-980.

Definition of judgment: Sec. 577; exceptions, need of: Secs. 646, 956.

As to appeal from judgment on controversy submitted without action: *Post*, sec. 1140.

Orders reviewable on appeal from judgment: *Post*, sec. 956.

§ 940. Appeal, how taken. An appeal is taken by filing with the clerk of the court in which the judgment or order appealed from is entered, a notice stating the appeal from the same, or some specific part thereof, and serving a similar notice on the adverse party or his attorney. The order of service is immaterial, but the appeal is ineffectual for any purpose unless within five days after service of the notice of appeal, an undertaking be filed, or a deposit of money be made with the clerk, as hereinafter provided, or the undertaking be waived by the adverse party in writing. En. March 11, 1872. Am'd. 1873-4, 336.

Cal. Rep. Cit. 46, 651; 48, 568; 52, 326; 54, 494; 55, 395; 56, 120; 60, 281; 60, 282; 62, 517; 63, 280; 63, 385; 65, 222; 67, 201; 68, 169; 68, 190; 68, 328; 68, 329; 68, 339; 68, 344; 68, 345; 69, 82; 71, 296; 72, 159; 72, 160; 74, 105; 75, 540; 75, 543; 79, 104; 79, 249; 80, 63; 81, 245; 83, 137; 83, 564; 83, 565; 87, 243; 83, 598; 95, 442; 99, 42; 99, 174; 99, 267; 103, 68; 109, 603; 111, 430; 112, 149; 112, 632; 114, 42; 116, 494;

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122, 389; 124, 543; 128, 243; 129, 158; 129, 190; 130, 61; 130, 554; 131, 289; 132, 198; 132, 253; 133, 362; 133, 363; 134, 179; 134, 181; 134, 460; 137, 375; 139, 77; 141, 357; 141, 358; 143, 465; 143, 479; 146, 575.

Prac. Act, sec. 337. En. April 29, 1851.

Cal. Rep. Cit. 15, 384; 24, 97; 24, 98; 25, 355; 29, 463; 30, 183; 30, 184; 38, 640; 39, 151; 60, 282; 62, 517; 115, 384.

Service of papers: Secs. 1010-1017.

Notice, generally: Post, secs. 1010 et seq.

Undertaking on appeal, requirements of: Post, sec. 941; unnecessary, when: Post, secs. 965, 1058; exception to sureties, time for: Ante, sec. 648.

Exceptions, necessity for: Ante, sec. 646, post, sec. 956.

As to the practice on appeals in criminal causes: See Pen. Code, secs. 1237 et seq.

§ 941. Undertaking or deposit on appeal. The undertaking on appeal must be in writing, and must be executed on the part of the appellant, by at least two sureties, to the effect that the appellant will pay all damages and costs which may be awarded against him on the appeal, or on a dismissal thereof, not exceeding three hundred dollars; or that sum must be deposited with the clerk with whom the judgment or order was entered, to abide the event of the appeal. En. March 11, 1872.

Cal. Rep. Cit. 52, 623; 54, 184; 54, 494; 58, 356; 63, 384; 63, 385; 64, 232; 64, 475; 67, 215; 69, 242; 69, 243; 71, 296; 72, 159; 72, 160; 80, 453; 81, 228; 89, 32; 89, 33; 94, 567; 98, 626; 107, 195; 109, 603; 123, 447; 126, 458; 129, 158; 129, 159; 129, 301; 132, 341; 134, 63; 136, 674; 137, 449; 140, 83; 140, 87; 141, 357; 143, 315; 144, 633.

Prac. Act, sec. 348. En. April 29, 1851.

Cal. Rep. Cit. 7, 132; 9, 39; 9, 250; 15, 384; 15, 386; 24, 96; 32, 374; 42, 278; 61, 338.

Prac. Act, sec. 360. En. April 29, 1851. Am'd. 1854, 65; 1865-6, 847.

Prac. Act, sec. 361. En. April 29, 1851. Am'd. 1854, 66.

Prac. Act, sec. 362. En. April 29, 1851. Am'd. 1853, 277; 1854, 66; 1854, 73.

Cal. Rep. Cit. 28, 117.

Undertaking on appeal, filing, time for: Sec. 940; and see sec. 1054; sufficiency of: Sec. 954; sureties, paying judgment: Sec. 1059.

Deposit with clerk: Sec. 948.

Filing new undertaking in appellate court: See post, §941a
sec. 954. Enact. p. 470

Qualification of sureties: Sec. 1057.

§ 942. Undertaking on appeal from a money judgment. §941b
If the appeal be from a judgment or order directing the Enact.
payment of money, it does not stay the execution of the p. 470
judgment or order unless a written undertaking be executed on the part of the appellant, by two or more sureties, to the effect that they are bound in double the amount named in the judgment or order; that if the judgment or order appealed from, or any part thereof, be affirmed, or the appeal be dismissed, the appellant will pay the amount directed to be paid by the judgment [or] order, or the part of such amount as to which the judgment or order is affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellant upon the appeal, and that if the appellant does not make such payment within thirty days after the filing of the remittitur from the supreme court in the court from which the appeal is taken, judgment may be entered on motion of the respondent in his favor against the sureties, for such amount, together with the interest that may be due thereon, and the damages and costs which may be awarded against the appellant upon the appeal. If the judgment or order appealed from be for a greater amount than two thousand dollars, and the sureties do not state in their affidavits of justification accompanying the undertaking, that they are each worth the sum specified in the undertaking, the stipulation may be that the judgment to be entered against the sureties shall be for such amounts only as in their affidavits they may state that they are severally worth, and judgment may be entered against the sureties by the court from which the appeal is taken, pursuant to the stipulations herein designated. When the judgment or order appealed from is made payable in a specified kind of money or currency, the judgment entered against the sureties upon the undertaking must be made payable in the same kind of money or currency. En. March 11, 1872. Am'd. 1873-4, 336.

Cal. Rep. Cit. 52, 623; 54, 184; 54, 494; 56, 158; 57, 232; 57, 233; 60, 619; 63, 285; 63, 384; 67, 199; 67, 220; 67, 581; 69, 242; 69, 243; 71, 296; 71, 298; 72, 153; 72, 160; 74, 50; 75, 262; 80, 453; 81, 228; 83, 434; 89, 33; 90, 555; 94, 567; 97, 354; 97, 359; 97, 436; 98, 443; 98, 444; 98, 445; 98, 627; 99, 284; 100, 101; 100, 102; 105, 414; 107, 195; 110, 309; 115, 282;

116, 460; 118, 114; 124, 333; 124, 334; 125, 354; 127, 561, 129, 301; 129, 387; 131, 42; 132, 128; 132, 341; 137, 460; 138, 57; 139, 143; 140, 83; 140, 87; 144, 633, 144, 746.

Prac. Act, sec. 349. En. April 29, 1851. Am'd. 1863, 690. Cal. Rep. Cit. 7, 132; 9, 39; 24, 96; 40, 280.

Deposit in lieu of undertaking: Ante, sec. 941; post, sec. 943.

Qualification of sureties: Post, sec. 1057.

Specified kind of money: Ante, sec. 667.

Stay where no provision made: Post, sec. 949.

§ 943. Appeal from a judgment for delivery of documents. If the judgment or order appealed from direct the assignment or delivery of documents or personal property, the execution of the judgment or order cannot be stayed by appeal, unless the things required to be assigned or delivered be placed in the custody of such officer or receiver as the court may appoint, or unless an undertaking be entered into on the part of the appellant, with at least two sureties, and in such amount as the court, or a judge thereof, may direct, to the effect that the appellant will obey the order of the appellate court upon the appeal. If the judgment or order appealed from appoint a receiver, the execution of the judgment or order cannot be stayed by appeal, unless a written undertaking be executed on the part of the appellant, with two or more sureties, to the effect that if such judgment or order be affirmed or the appeal dismissed, the appellant will pay all damages which the respondent may sustain by reason of such stay, not exceeding an amount to be fixed by the judge of the court by which the judgment was rendered or order made, which amount must be specified in the undertaking. If the judgment or order appealed from direct the sale of personal property upon the foreclosure of a mortgage thereon, the execution of the judgment or order cannot be stayed on appeal, unless an undertaking be entered into on the part of the appellant, with at least two sureties, in such amount as the court, or the judge thereof, may direct, to the effect that the appellant will, on demand, deliver the mortgaged property to the proper officer if the judgment be affirmed, or in default of such delivery that the appellant and sureties will, on demand, pay to the proper officer the full value of such property at the date of the appeal. En. March 11, 1872. Am'd. 1880, 6; 1897, 56.

Cal. Rep. Cit. 52, 623; 54, 184; 67, 581; 69, 242; 69, 243, 81, 228; 83, 206; 89, 33; 90, 555; 94, 567; 98,

442; 98, 445; 115, 282; 124, 333; 132, 341; 133, 265;
138, 57; 140, 83; 140, 87; 140, 333; 140, 334; 144,
632; 144, 633.

Prac. Act, sec. 350. En. April 29, 1851.

Cal. Rep. Cit. 24, 96.

Receiver: Sec. 564.

Undertaking: Sec. 941.

§ 944. Appeal from a judgment directing execution of a conveyance, etc. If the judgment or order appealed from direct the execution of a conveyance or other instrument, the execution of the judgment or order cannot be stayed by the appeal until the instrument is executed and deposited with the clerk with whom the judgment or order is entered, to abide the judgment of the appellate court. En. March 11, 1872.

Cal. Rep. Cit. 52, 623; 54, 184; 67, 581; 69, 242; 69, 243; 81, 228; 89, 33; 90, 555; 94, 567; 98, 442; 115, 282; 124, 333; 132, 341; 138, 57; 140, 83; 140, 87; 144, 633.

Prac. Act, sec. 351. En. April 29, 1851.

§ 945. Undertaking on appeal concerning real property. If the judgment or order appealed from direct the sale or delivery of possession of real property, the execution of the same cannot be stayed, unless a written undertaking be executed on the part of the appellant, with two or more sureties, to the effect that during the possession of such property by the appellant, he will not commit, or suffer to be committed, any waste thereon, and that if the judgment be affirmed, or the appeal dismissed, he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of possession thereof, pursuant to the judgment or order, not exceeding the sum to be fixed by the judge of the court by which the judgment was rendered or order made, and which must be specified in the undertaking. When the judgment is for the sale of mortgaged premises, and the payment of a deficiency arising upon the sale, the undertaking must also provide for the payment of such deficiency. En. March 11, 1872.

Cal. Rep. Cit. 52, 623; 54, 184; 64, 444; 67, 581; 69, 242; 69, 243; 71, 102; 71, 103; 71, 296; 71, 299; 71, 300; 77, 29; 80, 453; 81, 228; 84, 87; 84, 89; 89, 33; 90, 555; 91, 309; 92, 554; 94, 567; 95, 41; 95, 153; 97, 486; 97, 487; 97, 488; 98, 444; 98, 445; 98, 627; 99, 537; 104, 104; 104, 105; 105, 414; 105, 415; 105, 416; 105, 418; 105, 419; 107, 195; 107, 198; 115, 282; 116, 37; 116, 461; 120, 633; 124, 333; 124,

334; 129, 301; 129, 387; 130, 619; 132, 341; 134, 63; 135, 661; 138, 57; 139, 143; 140, 83; 140, 87; 144, 633.

Prac. Act, sec. 352. En. April 29, 1851.

Cal. Rep. Cit. 7, 132; 24, 96; 25, 346; 25, 353; 25, 354; 98, 627; 105, 416.

Mortgaged realty, sale or delivery of possession of: Ante, secs. 726, 744.

Deposit with clerk: Ante, sec. 941; post, sec. 943.

Undertaking, how executed: Sec. 941, ante.

Qualifications of sureties: Post, sec. 1057.

Waste: Ante, secs. 745, 746.

§ 946. Stay of proceedings. The security on appeal may be limited in the case of an executor, etc. Whenever an appeal is perfected, as provided in the preceding sections of this chapter, it stays all further proceedings in the court below upon the judgment or order appealed from, or upon the matters embraced therein, and releases from levy property which has been levied upon under execution issued upon such judgment; but the court below may proceed upon any other matter embraced in the action and not affected by the order appealed from. An[d] the court below may, in its discretion, dispense with or limit the security required by this chapter, when the appellant is an executor, administrator, trustee, or other person acting in another's right. An appeal does not continue in force an attachment unless an undertaking be executed and filed on the part of the appellant, by at least two sureties, in double the amount of the debt claimed by him, that the appellant will pay all costs and damages which the respondent may sustain by reason of the attachment, in case the order of the court below be sustained; and, unless, within five days after the entry of the order appealed from, such appeal be perfected. En. March 11, 1872. Am'd. 1873-4, 337.

Cal. Rep. Cit. 47, 585; 49, 74; 52, 77; 54, 494; 60, 626; 63, 610; 65, 333; 67, 377; 67, 378; 70, 294; 72, 198; 72, 573; 80, 63; 80, 392; 81, 228; 84, 9; 84, 360; 84, 381; 87, 244; 88, 481; 90, 81; 93, 575; 94, 567; 99, 501; 99, 512; 99, 516; 101, 584; 102, 657; 107, 539; 108, 450; 110, 403; 114, 214; 115, 83; 116, 493; 116, 494; 120, 633; 126, 187; 132, 341; 133, 113; 133, 247; 137, 373; 137, 494; 137, 496.

Prac. Act, sec. 353. En. April 29, 1851. Am'd. 1886, 707.

Cal. Rep. Cit. 25, 355.

§ 947. Undertaking may be in one instrument or several. The undertakings prescribed by sections nine hundred and forty-one, nine hundred and forty-two, nine hundred and forty-three, and nine hundred and forty-five, may be in one instrument or several, at the option of the appellant. En. March 11, 1872.

Prac. Act, sec. 354. En. April 29, 1851.

Cal. Rep. Cit. 25, 355.

§ 948. Justification of sureties on undertaking on appeal. The adverse party may except to the sufficiency of the sureties to any of the undertakings mentioned in sections nine hundred and forty-one, nine hundred and forty-two, nine hundred and forty-three, and nine hundred and forty-five, at any time within thirty days after notice of the filing of such undertaking; and unless they or other sureties, within twenty days after the appellant has been served with notice of such exception, justify before a judge of the court below, upon five days' notice to the respondent of the time and place of justification, execution of the judgment, order, or decree appealed from is no longer stayed; and in all cases where an undertaking is required on appeal by the provisions of this title, a deposit in the court below of the amount of the judgment appealed from, and three hundred dollars in addition, shall be equivalent to filing the undertaking; and in all cases the undertaking or deposit may be waived by the written consent of the respondent. En. March 11, 1872. Am'd. 1873-4, 338; 1880, 6; 1905, 155.

Cal. Rep. Cit. 52, 449; 54, 494; 60, 282; 65, 223; 68, 346; 68, 347; 81, 228; 95, 419; 97, 354; 97, 359; 99, 501; 109, 605; 110, 403; 115, 620; 130, 620; 135, 661.

Prac. Act, sec. 355. En. April 29, 1851. Am'd. 1854, 65; 1866, 708.

Cal. Rep. Cit. 18, 669; 24, 96; 32, 375.

Justification of sureties: Ante, sec. 495.

§ 949. Undertakings in cases not specified. In cases not provided for in sections nine hundred and forty-two, nine hundred and forty-three, nine hundred and forty-four, and nine hundred and forty-five, the perfecting of an appeal by giving the undertaking or making the deposit mentioned in section nine hundred and forty-one, stays proceedings in the court below upon the judgment or order appealed from, except where it directs the sale of perishable property; in which case the court below may order the property to be sold and the proceeds thereof to

be deposited, to abide the judgment of the appellate court; and except, also, where it adjudges the defendant guilty of usurping, or intruding into, or unlawfully holding a public office, civil or military, within this state, and except, also, where the order grants, or refuses to grant, a change of the place of trial of an action; and except also where it orders a corporation or its officers or agents, or any of them, to give to a person adjudged to be a director, stockholder or member of such corporation a reasonable opportunity to inspect or take copies of such books, papers or documents of the corporation as the court finds that such director, stockholder or member is entitled by law to inspect or copy. En. March 11, 1872. Am'd. 1873-4, 408; 1905, 22.

Cal. Rep. Cit. 52, 623; 63, 45; 64, 232; 67, 581; 69, 242; 69, 243; 70, 636; 70, 637; 73, 487; 81, 68; 84, 381; 89, 33; 94, 567; 98, 306; 98, 444; 111, 111; 115, 282; 115, 283; 119, 636; 123, 446; 124, 333; 125, 528; 125, 529; 129, 301; 131, 634; 132, 341; 138, 18; 138, 57; 138, 246; 140, 83; 140, 86; 140, 87; 143, 315; 144, 633.

Prac. Act, sec. 356. En. April 29, 1851.

Cal. Rep. Cit. 7, 132; 19, 119; 63, 45.

§ 950. What papers to be used on an appeal from the judgment. On an appeal from a final judgment, the appellant must furnish the court with a copy of the notice of appeal, of the judgment-roll, and of any bill of exceptions or statement in the case, upon which the appellant relies. Any statement used on motion for a new trial, or settled after decision of such motion, when the motion is made upon the minutes of the court, as provided in section six hundred and sixty-one, or any bill of exceptions settled, as provided in sections six hundred and forty-nine or six hundred and fifty, or used on motion for a new trial, may be used on appeal from a final judgment equally as upon appeal from the order granting or refusing the new trial. En. March 11, 1872. Am'd. 1873-4, 338.

Cal. Rep. Cit. 47, 605; 47, 641; 51, 111; 53, 283; 54, 212; 54, 236; 60, 279; 61, 195; 64, 594; 68, 338; 68, 339; 68, 369; 73, 600; 77, 298; 81, 399; 81, 638; 81, 639; 83, 160; 83, 622; 89, 69; 97, 182; 98, 107; 98, 109; 99, 178; 99, 651; 107, 143; 120, 641; 121, 225; 122, 2; 122, 481; 128, 138; 128, 139; 128, 140; 132, 198; 133, 588; 138, 603; 138, 606; 141, 152; 141, 154.

Prac. Act, sec. 346. En. April 29, 1851. Am'd. 1854, 64; 1864, 247.

Cal. Rep. Cit. 10, 214; 14, 153; 15, 326; 25, 512; 25, 584; 28, 56; 28, 305; 28, 650; 29, 613; 34, 34; 77, 299; 128, 138.

Judgment-roll: Ante, sec. 670.

Judgment, what orders reviewable: Post, sec. 956.

Transcript, authentication of: Post, sec. 953; contents: Post, secs. 951-952.

§ 951. What papers used on appeals from orders, except orders granting or refusing new trials. On appeal from a judgment rendered on an appeal, or from an order, except an order granting or refusing a new trial, the appellant must furnish the court with a copy of the notice of appeal, of the judgment or order appealed from, and of papers used on the hearing in the court below. En. March 11, 1872. Am'd. 1873-4, 339.

Cal. Rep. Cit. 47, 166; 54, 236; 56, 136; 56, 174; 58, 617; 61, 195; 63, 233; 68, 388; 69, 72; 70, 73; 75, 626; 77, 298; 79, 50; 80, 476; 81, 609; 100, 612; 109, 120; 114, 62; 119, 383; 125, 16; 127, 76; 128, 76; 132, 198; 133, 198; 133, 363; 137, 423; 142, 157.

§ 952. What papers to be used on an appeal from an order granting or refusing a new trial. On an appeal from an order granting or refusing a new trial, the appellant must furnish the court with a copy of the notice of appeal, of the order appealed from, and of the papers designated in section six hundred and sixty-one of this code. En. March 11, 1872. Am'd. 1873-4, 339.

Cal. Rep. Cit. 54, 236; 54, 547; 66, 407; 68, 23; 69, 73; 77, 298; 78, 385; 79, 123; 88, 149; 92, 64; 120, 236; 128, 46; 132, 198; 144, 280.

Papers on appeal generally: Ante, secs. 950, 951.

§ 953. Copies and undertakings, how certified. The copies provided for in the last three sections must be certified to be correct by the clerk or the attorneys, and must be accompanied with a certificate of the clerk or attorneys that an undertaking on appeal, in due form, has been properly filed, or a stipulation of the parties waiving an undertaking. En. March 11, 1872. Am'd. 1873-4, 339.

Cal. Rep. Cit. 52, 644; 54, 276; 54, 277; 57, 140; 77, 298; 83, 137; 109, 606; 109, 607; 111, 552; 120, 237; 128, 46; 132, 198; 136, 675; 144, 633.

Review on appeal: Ante sec. 53.

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§ 954. When an appeal may be dismissed. When not. If the appellant fails to furnish the requisite papers, the appeal may be dismissed; but no appeal can be dismissed for insufficiency of the undertaking thereon, if a good and sufficient undertaking, approved by a justice of the supreme court, be filed in the supreme court before the hearing upon motion to dismiss the appeal. When it is made to appear to the satisfaction of the court, or a judge thereof, from which the appeal was taken, that a surety or sureties upon an appeal bond from any cause has or have become insufficient, and the bond or undertaking inadequate as security for the payment of the judgment appealed from, the last-named court, or a judge thereof, may order the giving of a new bond with sufficient sureties, as a condition to the maintenance of the appeal. The said bond or undertaking shall be approved by the last-named court, or a judge thereof; and in case said sureties fail to justify before said last-named court, or a judge thereof, or fail to comply with the order to appear and justify, execution may issue upon the judgment as if no undertaking to stay execution had been given. En. March 11, 1872. Am'd. 1895, 59.

Cal. Rep. Cit. 52, 449; 54, 521; 71, 626; 72, 160; 77, 83; 78, 104; 81, 245; 81, 246; 89, 69; 89, 155; 96, 183; 100, 336; 107, 143; 109, 603; 109, 605; 110, 403; 114, 61; 119, 348; 119, 349; 126, 458; 126, 466; 128, 671; 129, 158; 129, 159; 136, 620; 144, 633; 147, 141.

§ 955. Effect of dismissal. The dismissal of an appeal is in effect an affirmance of the judgment or order appealed from, unless the dismissal is expressly made without prejudice to another appeal. En. March 11, 1872.

Cal. Rep. Cit. 54, 521; 80, 171; 97, 253; 128, 576.

§ 956. What may be reviewed on appeal from judgment. Upon an appeal from a judgment, the court may review the verdict or decision, and any intermediate order or decision excepted to, which involves the merits, or necessarily affects the judgment, except a decision or order from which an appeal might have been taken. En. March 11, 1872. Am'd. 1875-6, 92.

Cal. Rep. Cit. 51, 111; 53, 550; 54, 546; 56, 11; 61, 195; 64, 623; 67, 200; 67, 205; 67, 273; 67, 410; 68, 338; 68, 339; 69, 632; 70, 607; 76, 302; 77, 105; 84, 531; 84, 532; 99, 410; 116, 72; 130, 509; 131, 612; 134, 243; 135, 132; 137, 244; 140, 486; 145, 569.

Prac. Act, sec. 345. En. April 29, 1851.

Cal. Rep. Cit. 34, 301; 35, 359; 67, 410; 91, 619.

C. C. P., 1906.

§ 954. When an appeal may be dismissed. When not. If the appellant fails to furnish the requisite papers, the appeal may be dismissed; but no appeal can be dismissed for insufficiency of the undertaking thereon, if a good and sufficient undertaking, approved by a justice of the supreme court, be filed in the supreme court before the hearing upon motion to dismiss the appeal. When it is made to appear to the satisfaction of the court, or a judge thereof, from which the appeal was taken, that a surety or sureties upon an appeal bond from any cause has or have become insufficient, and the bond or undertaking inadequate as security for the payment of the judgment appealed from, or that the bond has been lost or destroyed, the last named court, or a judge thereof, may order the giving of a new bond with sufficient sureties, as a condition to the maintenance of the appeal. The said bond or undertaking shall be approved by the last-named court, or a judge thereof; and in case said sureties fail to justify before said last-named court, or a judge thereof, or fail to comply with the order to appear and justify, execution may issue upon the judgment as if no undertaking to stay execution had been given. [In effect June 14, 1906.]

§ 957. Remedial powers of an appellate court. When the judgment or order is reversed or modified, the appellate court may make complete restitution of all property and rights lost by the erroneous judgment or order, so far as such restitution is consistent with protection of a purchaser of property at a sale ordered by the judgment, or had under process issued upon the judgment, on the appeal from which the proceedings were not stayed; and for relief in such cases the appellant may have his action against the respondent, enforcing the judgment for the proceeds of the sale of the property, after deducting therefrom the expenses of the sale. When it appears to the appellate court that the appeal was made for delay, it may add to the costs such damages as may be just. En. March 11, 1872. Am'd. 1873-4, 340.

Cal. Rep. Cit. 64, 59; 79, 264; 79, 608; 80, 610; 91, 619; 95, 222; 95, 223; 97, 439; 105, 273; 106, 172; 120, 24; 124, 17, 125, 89; 128, 577; 129, 577; 131, 646; 137, 337; 137, 338; 137, 578; 137, 684; 139, 304; 139, 305; 143, 109; 143, 113; 143, 114.

Judgment reversed: Post, sec. 966.

Costs on appeal, generally: Post, sec. 1034; costs below, etc.: Post, secs. 1022, 1039; where modification of judgment: Post, sec. 1027, subd. 2.

§ 958. On judgment on appeal, remittitur must be certified to the clerk of the court below. When judgment is rendered upon the appeal, it must be certified by the clerk of the supreme court to the clerk with whom the judgment-roll is filed, or the order appealed from is entered. In cases of appeal from the judgment, the clerk with whom the roll is filed must attach the certificate to the judgment-roll, and enter a minute of the judgment of the supreme court on the docket, against the original entry. In cases of appeal from an order, the clerk must enter at length in the records of the court the certificate received, and minute against the entry of the order appealed from, a reference to the certificate, with a brief statement that such order has been affirmed, reversed, or modified by the supreme court on appeal. En. March 11, 1872.

Cal. Rep. Cit. 60, 619; 60, 621; 74, 106; 74, 107; 118, 114; 140, 195; 140, 196.

Prac. Act, sec. 358. En. April 29, 1851.

Cal. Rep. Cit. 8, 518; 12, 468; 16, 423; 74, 108.

Judgment rendered on appeal: Ante, secs. 43, 45.

Remittitur: Secs. 56, 958; judgment becomes final thirty days after it is filed: See Const., art. 6, sec. 2.

§ 959. Provisions of this chapter not applicable to appeals to superior courts. The provisions of this chapter do not apply to appeals to superior courts. En. March 11, 1872. Am'd. 1880, 7.

Cal. Rep. Cit. 119, 439; 122, 576.

Appeals to superior courts: Post, secs. 974-980.

CHAPTER II.

APPEALS TO SUPREME COURT.

[New chapter II, superseding the original chapter II, was adopted March 26, 1880. Amendments 1880, p. 14.]

§ 963. When an appeal may be taken.

§ 964. Appeals; in what cases appealed from justices' courts.

§ 965. Appeals by executors and administrators.

§ 966. Acts of executors and administrators, where appointment vacated.

§ 963. When an appeal may be taken. An appeal may be taken to the supreme court, from a superior court, in the following cases:

1. From a final judgment entered in an action, or special proceeding, commenced in a superior court, or brought into a superior court from another court;

2. From an order granting or refusing a new trial, or granting or dissolving an injunction, or refusing to grant or dissolve an injunction, or appointing a receiver, or dissolving or refusing to dissolve an attachment, or changing or refusing to change the place of trial, from any special order made after final judgment, from any interlocutory judgment, order, or decree hereafter made or entered in actions to redeem real or personal property from a mortgage thereof, or lien thereon, determining such right to redeem, and directing an accounting; and from such interlocutory judgment in actions for partition as determines the rights and interests of the respective parties, and directs partition to be made;

3. From a judgment or order granting or refusing to grant, revoking or refusing to revoke, letters testamentary,

or of administration, or of guardianship; or admitting or refusing to admit a will to probate, or against or in favor of the validity of a will, or revoking or refusing to revoke the probate thereof; or against or in favor of setting apart property, or making an allowance for a widow or child; or against or in favor of directing the partition, sale, or conveyance of real property, or settling an account of an executor, administrator, or guardian; or refusing, allowing, or directing the distribution or partition of an estate, or any part thereof, or the payment of a debt, claim, or legacy, or distributive share; or confirming or refusing to confirm a report of an appraiser or appraisers setting apart a homestead. En. March 11, 1872. Am'd. 1880, 14; 1889, 324; 1897, 209; 1899, 8; 1900-01, 85.

Cal. Rep. Cit. 45, 245; 60, 412; 62, 616; 72, 489; 74, 218; 91, 356; 98, 640; 99, 269; 112, 118; 116, 72; 138, 190; 140, 467; 140, 514; 142, 629; 142, 682; 146, 32; 147, 128; 147, 357; 147, 736. Subd. 1—93, 651; 118, 256; 122, 534; 125, 241; 131, 612; 133, 588; 135, 14; 135, 132. Subd. 2—56, 11; 65, 189; 77, 648; 78, 38; 82, 35; 88, 315; 93, 413; 98, 638; 98, 639; 110, 40; 110, 57; 111, 214; 119, 439; 119, 440; 122, 96; 130, 509; 134, 122; 136, 676; 137, 56. Subd. 3—56, 209; 60, 233; 65, 333; 67, 457; 68, 183; 70, 149; 71, 323; 72, 488; 73, 203; 74, 205; 74, 217; 75, 421; 80, 170; 82, 10; 82, 162; 83, 326; 83, 619; 83, 620; 84, 598; 86, 59; 86, 553; 88, 313; 88, 314; 90, 78; 94, 353; 98, 605; 102, 657; 106, 431; 109, 646; 110, 567; 111, 271; 117, 507; 118, 256; 119, 582; 120, 697; 121, 379; 121, 393; 128, 311; 128, 312; 130, 344; 131, 429; 133, 222; 145, 87; 145, 561.

Prac. Act, sec. 347. En. April 29, 1851. Am'd. 1854, 64; 1863, 756; 1866, 707.

Cal. Rep. Cit. 7, 253; 9, 19; 17, 517; 24, 337; 24, 448; 28, 320; 31, 208; 31, 367; 33, 390; 33, 391; 33, 392; 35, 290; 37, 23; 41, 642; 42, 114; 42, 390; 64, 623.

Prob. Act, sec. 297. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1855, 301; 1861, 654.

Ca. Rep. Cit. 30, 111; 45, 259.

Prob. Act, sec. 298. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1855, 301.

Cal. Rep. Cit. 34, 685.

Prob. Act, sec. 299. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1855, 301.

Cal. Rep. Cit. 25, 514; 45, 260.

Prob. Act, sec. 300. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1855, 302.

Cal. Rep. Cit. 25, 514; 34, 685.

Prob. Act, sec. 301. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1855, 302; 1861, 655.

Appeal from final judgment: Compare sec. 939, subd. 1, ante.

Appeals from orders: Compare sec. 939, subd. 3, ante.

Appeals from probate decisions, generally: Post, secs. 1714, 1715; special administration, granting, no appeal: Post, sec. 1413.

Appeals in criminal cases: See sec. 52, ante, and Pen. Code, secs. 1237, 1238.

§ 964. Appeals; in what cases appealed from justices' courts. The foregoing section does not apply in cases appealed from justices', police, or other inferior courts, except cases of forcible entry and detainer, and cases involving the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine, or in which the demand, exclusive of interest, or the value of the property in controversy, amounts to three hundred dollars. En. Stats. 1880, 15.

Cal. Rep. Cit. 58, 356; 110, 40; 119, 439.

Appeals to superior court: Post, secs. 974 et seq.

Forcible entry and detainer, concurrent jurisdiction of justices' courts: Ante, sec. 113, subd. 1.

§ 965. Appeals by executors and administrators. When an executor, administrator, or guardian, who has given an official bond, appeals from a judgment or order of the superior court made in the proceedings had upon the estate of which he is executor, administrator, or guardian, his official bond shall stand in the place of an undertaking on appeal; and the sureties thereon shall be liable as on such undertaking. En. Stats. 1880, 15.

Cal. Rep. Cit. 80, 63; 88, 481; 89, 155; 102, 657; 127, 451.

Probate appeals: Ante, sec. 963, subd. 3.

§ 966. Acts of executors and administrators, where appointment vacated. When the judgment or order appointing an executor, or administrator, or guardian, is reversed on appeal, for error, and not for want of jurisdiction of the court, all lawful acts in administration upon the estate performed by such executor, or administrator, or guardian, if he have qualified, are as valid as if such judgment or order had been affirmed. En. March 11, 1872. Am'd. 1873-4, 340; 1880, 15.

Prac. Act, sec. 359. En. April 29, 1851. Am'd. 1853, 277; 1854, 65; 1854, 73; 1865-6, 846.

Cal. Rep. Cit. 42, 51; 42, 60; 42, 72.

Appointment of executor, etc., appeal from: Sec. 963, subd. 3.

Restitution on reversal, etc.: Sec. 957.

§§ 967, 968. No such sections.

§ 969. En. March 11, 1872. Am'd. 1873-4, 341; 1877-8, 104. Rep. 1880, 64.

Cal. Rep. Cit. 50, 294; 51, 565; 54, 228; 55, 211; 55, 311; 56, 408; 56, 409; 56, 410; 88, 314. Subd. 5—61, 163. Subd. 8—88, 315.

§ 970. En. March 11, 1872. Rep. 1880, 64.

Cal. Rep. Cit. 61, 163.

§ 971. En. March 11, 1872. Am'd. 1873-4, 341. Rep. 1880, 64.

CHAPTER III.

[New chapter III, superseding the original chapter III, was adopted March 26, 1880, amendments 1880, p. 14.]

APPEALS TO SUPERIOR COURTS.

- § 974. Appeal from judgment of justice's or police court.
- § 975. Appeal on questions of law, statement.
- § 976. Appeal on questions of fact, or law and fact.
- § 977. Transmission of papers to appellate court.
- § 978. Undertaking on appeal.
- § 979. Stay of proceedings on filing undertaking.
- § 980. Power of superior court on appeal.

§ 974. Appeal from judgment of justice's or police court. Any party dissatisfied with a judgment rendered in a civil action in a police or justice's court, may appeal therefrom to the superior court of the county, at any time within thirty days after the rendition of the judgment. The appeal is taken by filing a notice of appeal with the justice or judge, and serving a copy on the adverse party. The notice must state whether the appeal is taken from the whole or a part of the judgment, and if from a part,

what part, and whether the appeal is taken on questions of law or fact, or both. En. March 11, 1872. Am'd. 1880, 15.

Cal. Rep. Cit. 50, 510; 58, 178; 60, 303; 68, 25; 70, 528; 71, 551; 72, 38; 79, 104; 86, 75; 88, 465; 88, 466; 90, 371; 102, 180; 119, 439; 119, 440.

Prac. Act, sec. 624. En. April 29, 1851. Am'd. 1853, 280; 1854, 70; 1854, 73.

Cal. Rep. Cit. 9, 573.

Prac. Act, sec. 640. En. April 29, 1851.

Notice of appeal, service on adverse party: See secs. 1010 et seq.

§ 975. Appeal on questions of law, statement. When a party appeals to the superior court on questions of law alone, he must, within ten days from the rendition of judgment, prepare a statement of the case and file the same with the justice or judge. The statement must contain the grounds upon which the party intends to rely on the appeal, and so much of the evidence as may be necessary to explain the grounds, and no more. Within ten days after he receives notice that the statement is filed, the adverse party, if dissatisfied with the same, may file amendments. The proposed statement and amendments must be settled by the justice or judge, and if no amendment be filed, the original statement stands as adopted. The statement thus adopted, or as settled by the justice or judge, with a copy of the docket of the justice or judge, and all motions filed with him by the parties during the trial, and the notice of appeal, may be used on the hearing of the appeal before the superior court. En. March 11, 1872. Am'd. 1880, 16.

Cal. Rep. Cit. 59, 474; 63, 435; 103, 139; 124, 470.

Prac. Act, sec. 625. En. April 29, 1851. Rep. 1853, 280. En. 1854, 70. Am'd. 1855, 198.

Cal. Rep. Cit. 8, 518; 9, 573; 19, 80.

Settlement of statement on appeal: Ante, sec. 650.

§ 976. Appeal on questions of fact, or law and fact. When a party appeals to the superior court on questions of fact, or on questions of both law and fact, no statement need be made, but the action must be tried anew in the superior court. En. March 11, 1872. Am'd. 1880, 16.

Cal. Rep. Cit. 59, 474; 65, 494; 68, 246; 106, 593; 124, 469; 131, 218; 132, 701.

Prac. Act, sec. 626. En. April 29, 1851. Am'd. 1853, 230; 1854, 70; 1854, 73.

Cal. Rep. Cit. 8, 518.

Conduct of trial: Post, sec. 980.

§ 977. **Transmission of papers to appellate court.** Upon receiving the notice of appeal, and on payment of the fees of the justice or judge, payable on appeal and not included in the judgment, and filing and undertaking as required in the next section, and after settlement or adoption of statement, if any, the justice or judge must, within five days, transmit to the clerk of the superior court, if the appeal be on questions of law alone, a certified copy of his docket, the statement as admitted or as settled, the notice of appeal, and the undertaking filed; or, if the appeal be on questions of fact, or both law and fact, a certified copy of his docket, the pleadings, all notices, motions, and all other papers filed in the cause, the notice of appeal, and the undertaking filed; and the justice or judge may be compelled by the superior court by an order entered upon motion, to transmit such papers, and may be fined for neglect or refusal to transmit the same. A certified copy of such order may be served on the justice or judge by the party or his attorney. In the superior court, either party may have the benefit of all legal objections made in the justice's or police court. En. March 11, 1872. Am'd. 1880, 16; 1897, 210.

Cal. Rep. Cit. 59, 474; 86, 432; 102, 179; 102, 180; 102, 183; 124, 469.

Prac. Act, sec. 627. En. April 29, 1851. Am'd. 1853, 280; 1854, 70; 1854, 73; 1855, 198.

Cal. Rep. Cit. 5, 90; 8, 518; 9, 18; 9, 572; 9, 573; 25, 211; 102, 181.

§ 978. **Undertaking on appeal.** An appeal from a justice's or police court is not effectual for any purpose, unless an undertaking be filed with two or more sureties in the sum of one hundred dollars for the payment of the costs on the appeal; or, if a stay of proceedings be claimed, in a sum equal to twice the amount of the judgment, including costs, when the judgment is for the payment of money; or twice the value of property, including costs, when the judgment is for the recovery of specific personal

property, and must be conditioned, when the action is for the recovery of money, that the appellant will pay the amount of the judgment appealed from, and all costs, if the appeal be withdrawn or dismissed, or the amount of any judgment and all costs that may be recovered against him in the action in the superior court. When the action is for the recovery of or to enforce or foreclose a lien on specific personal property, the undertaking must be conditioned that the appellant will pay the judgment and costs appealed from, and obey the order of the court made therein, if the appeal be withdrawn or dismissed, or any judgment and costs that may be recovered against him in said action in the superior court, and will obey any order made by the court therein. When the judgment appealed from directs the delivery of possession of real property, the execution of the same cannot be stayed unless a written undertaking be executed on the part of the appellant, with two or more sureties, to the effect that during the possession of such property by the appellant, he will not commit, or suffer to be committed, any waste thereon, and that if the appeal be dismissed or withdrawn, or the judgment affirmed, or judgment be recovered against him in the action in the superior court, he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of possession thereof; or that he will pay any judgment and costs that may be recovered against him in said action in the superior court, not exceeding a sum to be fixed by the justice of the court from which the appeal is taken, and which sum must be specified in the undertaking. A deposit of the amount of the judgment, including all costs appealed from or of the value of the property, including all costs in actions for the recovery of specific personal property, with the justice or judge, is equivalent to the filing of the undertaking, and in such cases, the justice or judge must transmit the money to the clerk of the superior court, to be by him paid out on the order of the court. The adverse party may except to the sufficiency of the sureties within five days after the filing of the undertaking, and unless they or other sureties justify before the justice or judge within five days thereafter, upon notice to the adverse party, to the amounts stated in their affidavits, the appeal must be regarded as if no such undertaking had been given. En. March 11, 1872. Am'd. 1880, 16.

Cal. Rep. Cit. 47, 606; 56, 83; 58, 178; 61, 338; 67, 69; 67, 115; 68, 25; 71, 551; 86, 75; 86, 76; 88, 465; 88, 466; 90, 370; 90, 372; 98, 43; 102, 180; 106, 48; 113, 442; 147, 178; 147, 174.

Prac. Act, sec. 628. En. April 29, 1851. Am'd. 1853, 280; 1854, 70; 1854, 73; 1855, 198; 1860, 305.

Cal. Rep. Cit. 9, 573; 32, 50.

Undertaking on appeal: Compare sec. 941, ante.

Sureties, justification: Ante, sec. 948; qualification: Post, sec. 1057.

§ 979. Stay of proceedings on filing undertaking. If an execution be issued on the filing of the undertaking staying proceedings, the justice or judge must, by order, direct the officer to stay all proceedings on the same. Such officer must, upon payment of his fees for services rendered on the execution, thereupon relinquish all property levied upon, and deliver the same to the judgment debtor, together with all moneys collected from sales or otherwise. If his fees be not paid, the officer may retain so much of the property or proceeds thereof as may be necessary to pay the same. En. March 11, 1872. Am'd. 1880, 17.

Cal. Rep. Cit. 56, 84; 58, 179; 90, 370; 93, 44; 136, 184.

Prac. Act, sec. 629. En. April 29, 1851.

§ 980. Powers of superior court on appeal. Upon an appeal heard upon a statement of the case, the superior court may review all orders affecting the judgment appealed from, and may set aside, or confirm, or modify any or all of the proceedings subsequent to and dependent upon such judgment, and may, if necessary or proper, order a new trial. When the action is tried anew on appeal, the trial must be conducted in all respects as other trials in the superior court. The provisions of this code as to changing the place of trial, and all the provisions as to trials in the superior court, are applicable to trials on appeal in the superior court. For a failure to prosecute an appeal, or unnecessary delay in bringing it to a hearing, the superior court, after notice, may order the appeal to be dismissed, with costs; and if it appear to such court that the appeal was made solely for delay, it may add to the costs such damages as may be just, not exceeding twenty-five per cent of the judgment appealed from. Judgments rendered in the superior court on appeal shall have the same force and effect, and may be enforced in the same manner, as judgments in actions commenced in the superior court. En. March 11, 1872. Am'd. 1880, 17.

Cal. Rep. Cit. 50, 510; 59, 475; 65, 45; 65, 494; 66, 388; 71, 557; 71, 582; 77, 307; 84, 9; 86, 432; 94, 356; 119, 441; 124, 473.

Prac. Act, sec. 367. En. April 29, 1851. Am'd. 1854, 66.
Cal. Rep. Cit. 8, 518; 9, 573; 40, 647.

Amendments: Ante, sec. 473.

Trial de novo: See ante, sec. 976.

New trial: Ante, secs. 656 et seq.

The foregoing sections end chapter 3, which, with chapter 2 of title 13 of part 2, was entirely amended, and the foregoing chapters, 2 and 3, adopted as substitutes therefor, by act approved March 26, 1880; Amendments 1880, 14 (Ban. ed. 52); took effect immediately; repealed all acts and parts of acts in conflict therewith.

CHAPTERS IV, V.

Chapters 4 and 5, of title 13 of part 2, and each and every section thereof, relating to appeals from probate courts and appeals to county courts, were repealed by act approved April 15, 1880; Amendments 1880, 64 (Ban. ed. 238).

The act is as follows:

An act to repeal chapters four and five, of title thirteen, of part two, of the Code of Civil Procedure, and each and every section of said chapters four and five, relating to appeals in civil actions. [Approved April 15, 1880.]

The people of the state of California, represented in senate and assembly, do enact as follows:

§ 1. Chapters four and five, of title thirteen, of part two, of the Code of Civil Procedure, and each and every section of said chapters four and five [secs. 969-980], are hereby repealed.

§ 2. This act shall take effect immediately.

TITLE XIV.

OF MISCELLANEOUS PROVISIONS.

Chapter I. Proceedings Against Joint Debtors, §§ 989-994.

II. Offer of the Defendant to Compromise, § 997.

III. Inspection of Writings, § 1000.

IV. Motions and Orders, §§ 1003-1007.

V. Notices, and Filing and Service of Papers, §§ 1010-1017.

VI. Of Costs, §§ 1021-1039.

VII. General Provisions, §§ 1045-1059.

CHAPTER I.

PROCEEDINGS AGAINST JOINT DEBTORS.

§ 989. Parties not summoned in action on joint contract may be summoned after judgment.

§ 990. Summons in that case, what to contain, and how served.

§ 991. Affidavit to accompany summons.

§ 992. Answer, when filed and what it may contain.

§ 993. What constitute the pleadings in the case.

§ 994. Issues, how tried. Verdict, what to be.

§ 989. Parties not summoned in action on joint contract may be summoned after judgment. When a judgment is recovered against one or more of several persons, jointly indebted upon an obligation, by proceeding, as provided in section four hundred and fourteen, those who were not originally served with the summons, and did not appear to the action, may be summoned to show cause why they should not be bound by the judgment in the same manner as though they had been originally served with the summons. En. March 11, 1872.

Cal. Rep. Cit. 67, 26; 69, 453; 69, 621; 70, 114; 140, 550.

Prac. Act, sec. 368. En. April 29, 1851.

Cal. Rep. Cit. 39, 98.

Cognate provisions: Ante, secs. 383, 414, 579.

Joining persons severally liable upon instrument: Ante, sec. 383.

Summons served on one defendant out of several, plaintiff may proceed against him alone: Ante, sec. 414.

Judgment against some defendants, proceeding continuing against others: Ante, sec. 579.

Release of one joint debtor does not discharge others: Civ. Code, sec. 1543.

§ 990. **Summons in that case, what to contain, and how served.** The summons, as provided in the last section, must describe the judgment, and require the person summoned to show cause why he should not be bound by it, and must be served in the same manner and returnable within the same time as the original summons. It is not necessary to file a new complaint. En. March 11, 1872.

Cal. Rep. Cit. 140, 550.

Prac. Act, sec. 369. En. April 29, 1851.

Summons, contents, service, etc.: Ante, secs. 407, 410 et seq.

§ 991. **Affidavit to accompany summons.** The summons must be accompanied by an affidavit of the plaintiff, his agent, representative, or attorney, that the judgment, or some part thereof, remains unsatisfied, and must specify the amount due thereon. En. March 11, 1872.

Cal. Rep. Cit. 140, 550.

Prac. Act, sec. 370. En. April 29, 1851.

§ 992. **Answer, when filed and what it may contain.** Upon such summons, the defendant may answer within the time specified therein, denying the judgment, or setting up any defense which may have arisen subsequently; or he may deny his liability on the obligation upon which the judgment was recovered, except a discharge from such liability by the statute of limitations. En. March 11, 1872.

Cal. Rep. Cit. 140, 550.

Prac. Act, sec. 371. En. April 29, 1851.

Answer, generally: Ante, sec. 437.

§ 993. **What constitute the pleadings in the case.** If the defendant, in his answer, deny the judgment, or set up any defense which may have arisen subsequently, the summons, with the affidavit annexed, and the answer, constitute the written allegations in the case; if he deny his liability on the obligation upon which the judgment was recovered, a copy of the original complaint and judgment,

the summons, with the affidavit annexed, and the answer, constitute such written allegations. En. March 11, 1872.

Cal. Rep. Cit. 140, 550.

Prac. Act, sec. 372. En. April 29, 1851.

§ 994. Issues, how tried. Verdict, what to be. The issues formed may be tried as in other cases; but when the defendant denies, in his answer, any liability on the obligation upon which the judgment was rendered, if a verdict be found against him it must be for not exceeding the amount remaining unsatisfied on such original judgment, with interest thereon. En. March 11, 1872.

Cal. Rep. Cit. 67, 26; 69, 458; 140, 550; 140, 553.

Prac. Act, sec. 373. En. April 29, 1851.

Cal. Rep. Cit. 39, 98.

Trial. Ante, secs. 607-645.

CHAPTER II.

OFFER OF THE DEFENDANT TO COMPROMISE.

§ 997. Proceedings on offer of the defendant to compromise after suit brought.

§ 997. Proceedings on offer of the defendant to compromise after suit brought. The defendant may, at any time before the trial or judgment, serve upon the plaintiff an offer to allow judgment to be taken against him for the sum or property, or to the effect therein specified. If the plaintiff accept the offer, and give notice thereof, within five days, he may file the offer, with proof of notice of acceptance, and the clerk must thereupon enter judgment accordingly. If the notice of acceptance be not given, the offer is to be deemed withdrawn, and cannot be given in evidence upon the trial; and if the plaintiff fail to obtain a more favorable judgment, he cannot recover costs, but must pay the defendant's costs from the time of the offer. En. March 11, 1872. Am'd. 1873-4, 341.

Cal. Rep. Cit. 61, 71; 61, 253; 61, 258; 72, 395; 84, 215; 107, 322.

Prac. Act, sec. 390. En. April 29, 1851.

Offer, not an admission: Post, sec. 2073; equivalent to tender: Post, sec. 2074.

Judgment, by confession: Post, sec. 1132.

CHAPTER III.

INSPECTION OF WRITINGS.

§ 1000. A party may demand inspection and copy of a book, paper, etc.

§ 1000. A party may demand inspection and copy of a book, paper, etc. Any court in which an action is pending, or a judge thereof, may, upon notice, order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy, of entries of accounts in any book, or of any document or paper in his possession, or under his control, containing evidence relating to the merits of the action, or the defense therein. If compliance with the order be refused, the court may exclude the entries of accounts of the book, or the document, or paper from being given in evidence, or if wanted as evidence by the party applying, may direct the jury to presume them to be such as he alleges them to be; and the court may also punish the party refusing for a contempt. This section is not to be construed to prevent a party from compelling another to produce books, papers, or documents, when he is examined as a witness. En. March 11, 1872. Am'd. 1873-4, 342; 1880, 72.

Cal. Rep. Cit. 105, 613; 105, 620; 126, 239; 136, 337; 144, 421.

Prac. Act, sec. 446. En. April 29, 1851.

Cal. Rep. Cit. 9, 38.

Items of an account: Ante, sec. 454.

Compelling production of books, etc.: Post, secs. 1985 et seq.; see, also, post, secs. 1938, 1939.

Contempt: Post, secs. 1209 et seq.

CHAPTER IV.

MOTIONS AND ORDERS.

- § 1003. Order and motion defined.
 § 1004. Motions and orders, where made.
 § 1005. Notice of motion, at what time to be given.
 § 1006. Transfer of motions and orders to show cause.
 § 1007. Order for payment of money, how enforced.

§ 1003. Order and motion defined. Every direction of a court or judge made or entered in writing, and not included in a judgment, is denominated an order. An application for an order is a motion. En. March 11, 1872.

Cal. Rep. Cit. 63, 508; 80, 170; 83, 135; 83, 232; 98, 640; 99, 514; 117, 240; 119, 440; 126, 278; 132, 325; 133, 363; 144, 100; 147, 128.

Prac. Act, sec. 515. En. April 29, 1851.

Cal. Rep. Cit. 27, 339.

Order, vacating: Ante, sec. 937; enforcement: Ante, sec. 128, subd. 4; renewing, application for: Ante, secs. 182, 183; final, effect of as estoppel: Post, sec. 1908.

Motion, notice of: Post, sec. 1005; heard before court commissioners: Ante, sec. 259, subd. 1.

§ 1004. Motions and orders, where made. Motions must be made in the county, or city and county, in which the action is pending. Orders made out of court may be made by the judge of the court in any part of the state. En. March 11, 1872. Am'd. 1880, 12.

Cal. Rep. Cit. 68, 641; 99, 513.

Prac. Act, sec. 516. En. April 29, 1851.

Cal. Rep. Cit. 80, 564; 35, 691.

Power of judge at chambers: Ante, secs. 165, 166, 176.

Court commissioner's control of ex parte motions: Ante, sec. 259, subd. 1.

§ 1005. Notice of motion, at what time to be given. When a written notice of a motion is necessary, it must be given, if the court be held in the same county, or city and county, with both parties, five days before the time appointed for the hearing; otherwise, ten days. When the notice is served by mail, the number of days before the

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hearing must be increased one day for every twenty-five miles of distance between the place of deposit and the place of service; such increase, however, not to exceed in all thirty days; but in all cases the court, or a judge thereof, may prescribe a shorter time. En. March 11, 1872. Am'd. 1880, 18.

Cal. Rep. Cit. 75, 263; 75, 264; 80, 376; 98, 322; 99, 325; 118, 591; 129, 650.

Prac. Act, sec. 517. En. April 29, 1851; 1853, 278.

Cal. Rep. Cit. 48, 451.

Written, notice must be: Post, sec. 1010; order made without notice: Ante, sec. 937.

Service, of papers, generally: Post, secs. 1010 et seq.

§ 1006. **Transfer of motions and orders to show cause.** When a notice of motion is given, or an order to show cause is made returnable, before a judge out of court, and at the time fixed for the motion, or on the return day of the order, the judge is unable to hear the parties, the matter may be transferred by the order of some other judge, before whom it might originally have been brought. En. March 11, 1872.

Cal. Rep. Cit. 64, 438.

Prac. Act, sec. 518. En. April 29, 1851.

Notice of motion: Ante, sec. 1005.

§ 1007. **Order for payment of money, how enforced.** Whenever an order for the payment of a sum of money is made by a court, pursuant to the provisions of this code, it may be enforced by execution in the same manner as if it were a judgment. En. March 11, 1872.

Cal. Rep. Cit. 68, 328; 68, 331; 75, 38; 79, 514; 79, 602; 79, 603; 128, 187; 129, 388.

Enforced by execution: Ante, secs. 681 et seq.; contempt: Post, secs. 1209 et seq.

CHAPTER V.

NOTICES, AND FILING AND SERVICE OF PAPERS.

- § 1010. Notices and papers, how served.
- § 1011. When and how served.
- § 1012. Service by mail, when.
- § 1013. Service by mail, how.
- § 1014. Appearance. Notices after appearance.
- § 1015. Service on nonresidents. Where a party has an attorney, service shall be on such attorney.
- § 1016. Preceding provisions not to apply to proceeding to bring party into contempt.
- § 1017. Service by telegraph.

§ 1010. Notices and papers, how served. Notices must be in writing, and notices and other papers may be served upon the party or attorney in the manner prescribed in this chapter, when not otherwise provided by this code. En. March 11, 1872.

Cal. Rep. Cit. 58, 96; 63, 580; 66, 470; 66, 471; 89, 40; 94, 444; 95, 367; 97, 526; 99, 176; 118, 297; 122, 211; 129, 358; 136, 866.

Prac. Act, sec. 519. En. April 29, 1851.

Cal. Rep. Cit. 30, 183.

§ 1011. When and how served. The service may be personal, by delivery to the party or attorney on whom the service is required to be made, or it may be as follows: §1011 Am'd. p. 474

1. If upon an attorney, it may be made during his absence from his office, by leaving the notice or other papers with his clerk therein, or with a person having charge thereof; or when there is no person in the office, by leaving them between the hours of eight in the morning and six in the afternoon, in a conspicuous place in the office; or if it be not open so as to admit of such service, then by leaving them at the attorney's residence, with some person of suitable age and discretion; and if his residence be not known, then by putting the same, inclosed in an envelope, into the postoffice, directed to such attorney;

2. If upon a party, it may be made by leaving the notice or other paper at his residence, between the hours of eight in the morning and six in the evening, with some person of suitable age and discretion; and if his residence

be not known, by putting the same, inclosed in an envelope, into the postoffice, directed to such party. En. March 11, 1872.

Cal. Rep. Cit. 46, 651; 49, 511; 58, 189; 63, 580; 67, 454; 73, 538; 75, 263; 75, 264; 94, 444; 94, 639; 94, 640; 129, 190; 131, 289; 136, 366. Subd. 1—61, 467; 65, 59; 76, 620; 119, 108; 122, 211; 142, 604. Subd. 2—61, 467; 76, 626.

Prac. Act, sec. 520. En. April 29, 1851.

Cal. Rep. Cit. 24, 96; 28, 154; 34, 660.

Service, on attorney: Post, sec. 1015.

Duty of sheriff serving to exhibit: See Pol. Code, sec. 4188.

Coroner to serve when sheriff a party: See Pol. Code, sec. 4191.

Elisor may be appointed to execute, when: See Pol. Code, sec. 4192.

Justification of sheriff: See Pol. Code, sec. 4187.

§ 1012. Service by mail, when. Service by mail may be made, where the person making the service, and the person on whom it is to be made, reside or have their offices in different places, between which there is a regular communication by mail. En. March 11, 1872. Am'd. 1873-4, 343.

Cal. Rep. Cit. 46, 651; 61, 508; 63, 122; 63, 580; 65, 222; 83, 575; 83, 576; 94, 639; 94, 640; 129, 190.

Prac. Act, sec. 521. En. April 29, 1851.

Cal. Rep. Cit. 24, 96; 30, 183; 30, 184.

§1013 § 1013. Service by mail, how. In case of service by Am'd. mail, the notice or other paper must be deposited in the p. 474 postoffice, addressed to the person on whom it is to be served, at his office or place of residence, and the postage paid. The service is complete at the time of the deposit, but if within a given number of days after such service a right may be exercised, or an act is to be done by the adverse party, the time within which such right may be exercised or act be done is extended one day for every twenty-five miles distance between the place of deposit and the place of address, such extension, however, not to exceed ninety days in all. En. March 11, 1872. Am'd. 1873-4, 343.

Cal. Rep. Cit. 61, 466; 61, 467; 61, 508; 63, 580; 65, 222; 73, 308; 83, 575; 83, 576; 83, 577; 91, 587; 94, 640; 115, 621; 129, 190; 132, 253.

Prac. Act, sec. 522. En. April 29, 1851. Am'd. 1861, 497.

Cal. Rep. Cit. 24, 96; 30, 183; 30, 184.

Distance: Ante, sec. 1005.

§ 1014. Appearance. Notices after appearance. A defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him. After appearance, a defendant or his attorney is entitled to notice of all subsequent proceedings of which notice is required to be given. But where a defendant has not appeared, service of notice of papers need not be made upon him unless he is imprisoned for want of bail. En. March 11, 1872.

Cal. Rep. Cit. 55, 3; 56, 629; 63, 580; 67, 103; 75, 239; 111, 522; 112, 632; 113, 305; 122, 450; 125, 300; 125, 543; 132, 83; 139, 717; 141, 8; 146, 573.

Prac. Act, sec. 523. En. April 29, 1851.

Cal. Rep. Cit. 17, 517; 27, 293; 30, 183.

Appearance, waiver of summons: Ante, secs. 406, 416.

Notice of subsequent proceedings, how given: Post, sec. 1015.

§ 1015. Service on nonresidents. Where a party has an attorney, service shall be on such attorney. When a plaintiff or a defendant, who has appeared, resides out of the state, and has no attorney in the action or proceeding, the service may be made on the clerk for him. But in all cases where a party has an attorney in the action or proceeding, the service of papers, when required, must be upon the attorney instead of the party, except of subpoenas, of writs, and other process issued in the suit, and of papers to bring him into contempt. En. March 11, 1872.

Cal. Rep. Cit. 63, 580; 65, 191; 70, 528; 86, 244; 119, 108; 125, 662; 128, 244; 129, 190; 131, 289; 139, 717.

Prac. Act, sec. 524. En. April 29, 1851.

Cal. Rep. Cit. 30, 183; 39, 151.

Attorney, authority of: Ante, sec. 283; duties of: Ante, sec. 282; disbarred, when: Ante, secs. 287-299.

Service, how made: Ante, sec. 1011.

§ 1016. Preceding provisions not to apply to proceeding to bring party into contempt. The foregoing provisions

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of this chapter do not apply to the service of a summons or other process, or of any paper to bring a party into contempt. En. March 11, 1872.

Cal. Rep. Cit. 63, 580; 65, 191; 125, 662.

§ 1017. **Service by telegraph.** Any summons, writ, or order, in any civil suit or proceeding, and all other papers requiring service, may be transmitted by telegraph for service in any place, and the telegraphic copy of such writ, or order, or paper, so transmitted, may be served or executed by the officer or person to whom it is sent for that purpose, and returned by him, if any return be requisite, in the same manner, and with the same force and effect, in all respects, as the original thereof might be if delivered to him, and the officer or person serving or executing the same has the same authority, and is subject to the same liabilities, as if the copy were the original. The original, when a writ or order, must also be filed in the court from which it was issued, and a certified copy thereof must be preserved in the telegraph office from which it was sent. In sending it, either the original or the certified copy may be used by the operator for that purpose. Whenever any document to be sent by telegraph bears a seal, either private or official, it is not necessary for the operator, in sending the same, to telegraph a description of the seal, or any words or device thereon, but the same may be expressed in the telegraphic copy by the letters "L. S." or by the word "seal." En. March 11, 1872.

CHAPTER VI.

OF COSTS.

- § 1021. Compensation of attorneys. Costs to parties.
- § 1022. When allowed, of course, to the plaintiff.
- § 1023. Several actions brought on a single cause of action can carry costs in but one.
- § 1024. Defendant's costs must be allowed, of course, in certain cases.
- § 1025. Costs, when in the discretion of the court.
- § 1026. When the several defendants are not united in interest, costs may be severed.
- § 1027. Costs of appeal discretionary with the court, in certain cases.
- § 1028. Referee's fees.
- § 1029. Continuance, costs may be imposed as condition of.
- § 1030. Costs when a tender is made before suit brought.
- § 1031. Costs in action by or against an administrator, etc.
- § 1032. Costs in a review other than by appeal.
- § 1033. Filing of, and affidavit, to bill of costs.
- § 1034. Costs on appeal, how claimed and recovered.
- § 1035. Interest and costs must be included by the clerk in the judgment.
- § 1036. When plaintiff is a non-resident or foreign corporation, defendant may require security for costs.
- § 1037. If such security be not given, the action may be dismissed.
- § 1038. Costs when state is a party.
- § 1039. Costs when county is a party.

§ 1021. Compensation of attorneys. Costs to parties. The measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties; but parties to actions or proceedings are entitled to costs and disbursements, as hereinafter provided. En. March 11, 1872.

Cal. Rep. Cit. 63, 88; 63, 92; 90, 548; 93, 571; 117, 221; 120, 452; 120, 454; 122, 54; 128, 155; 130, 236; 136, 172; 140, 22.

Prac. Act, sec. 494. En. April 29, 1851. Am'd. 1853, 277; 1855, 250.

Foreclosure, counsel fees on: Post, sec. 1500. See post, Appendix, title Mortgages.

Action on fencing-bond, counsel fees: Post, sec. 1251.

Mechanics' liens—Costs and counsel fees: Post, sec. 1195.

Partition—Costs and counsel fees: Ante, secs. 796, 798, 801.

Probate matter—Attorneys' fees: Post, sec. 1718.

Costs in particular actions: See particular title.

§ 1022. When allowed, of course, to the plaintiff. Costs are allowed, of course, to the plaintiff, upon a judgment in his favor, in the following cases:

1. In an action for the recovery of real property;
2. In an action to recover the possession of personal property, where the value of the property amounts to three hundred dollars or over; such value shall be determined by the jury, court, or referee by whom the action is tried;
3. In an action for the recovery of money or damages, when plaintiff recovers three hundred dollars or over;
4. In a special proceeding;
5. In an action which involves the title or possession of real estate, or the legality of any tax, impost, assessment, toll, or municipal fine. En. March 11, 1872.

Cal. Rep. Cit. 72, 458; 120, 260; 120, 449; 123, 152; 123, 153; 141, 95; 144, 433; 144, 547; 145, 455; 145, 456. Subd. 1—144, 432. Subd. 3—64, 290; 86, 461; 120, 259; 122, 223; 125, 49; 134, 42. Subd. 5—74, 566; 130, 224; 144, 432.

Prac. Act, sec. 495. En. April 29, 1851. Am'd. 1853, 277; 1865-6, 847; 1869-70, 65.

Costs, discretionary, when: Post, secs. 1025, 1027.

Subd. 2. Personal property, value: Post, sec. 1025.

Subd. 3. Money or damages: Post, sec. 1025.

Subd. 4. Special proceeding, generally: Post, secs. 1063-1821.

Act requiring security for costs in libel and slander: See post, Appendix, title Libel.

§ 1023. Several actions brought on a single cause of action can carry costs in but one. When several actions are brought on one bond, undertaking, promissory note, bill of exchange, or other instrument in writing, or in any other case for the same cause of action, against several parties who might have been joined as defendants in the same action, no costs can be allowed to the plaintiff in more than one of such actions, which may be at his election, if the party proceeded against in the other actions were, at the commencement of the previous action, openly within this state; but the disbursements of the plaintiff must be allowed to him in each action. En. March 11, 1872.

Prac. Act, sec. 496. En. April 29, 1851.

Several parties, who might have been joined as defendants: Ante, sec. 383.

§ 1024. Defendants' costs must be allowed, of course, in certain cases. Costs must be allowed, of course, to the defendant, upon a judgment in his favor in the actions mentioned in section ten hundred and twenty-two, and in special proceedings. En. March 11, 1872.

Cal. Rep. Cit. 72, 458; 74, 566; 122, 223; 125, 49; 134, 42; 138, 23; 144, 433.

Prac. Act, sec. 497. En. April 29, 1851.

Cal. Rep. Cit. 29, 282.

Special proceedings, generally: Secs. 1063-1821.

§ 1025. Costs, when in the discretion of the court. In other actions than those mentioned in section ten hundred and twenty-two, costs may be allowed or not, and, if allowed, may be apportioned between the parties, on the same or adverse sides, in the discretion of the court; but no costs can be allowed in an action for the recovery of money or damages when the plaintiff recovers less than three hundred dollars, nor in an action to recover the possession of personal property, when the value of the property is less than three hundred dollars. En. March 11, 1872.

Cal. Rep. Cit. 65, 296; 68, 37; 72, 458; 96, 239; 101, 237; 119, 357; 120, 259; 126, 149; 136, 6; 138, 23; 141, 95; 144, 432; 144, 433; 144, 547; 145, 455; 145, 456; 145, 736.

Prac. Act, sec. 498. En. April 29, 1851. Am'd. 1865-6, 847.

Cal. Rep. Cit. 6, 287; 17, 339; 28, 566; 29, 282.

§ 1026. When the several defendants are not united in interest, cost may be severed. When there are several defendants in the actions mentioned in section ten hundred and twenty-two, not united in interest, and making separate defenses by separate answers, and plaintiff fails to recover judgment against all, the court must award costs to such of the defendants as have judgment in their favor. En. March 11, 1872.

Prac. Act, sec. 499. En. April 29, 1851.

Judgment for some defendants: Ante, sec. 578.

Costs where several defendants: Ante, sec. 1023.

§ 1027. Costs of appeal discretionary with the court, in certain cases. In the following cases, the costs of appeal is [are] in the discretion of the court:

1. When a new trial is ordered;
2. When a judgment is modified. En. March 11, 1872.
Prac. Act, sec. 500. En. April 29, 1851.
Cal. Rep. Cit. 29, 282.

§ 1028. Referee's fees. The fees of referees are five dollars to each for every day spent in the business of the reference; but the parties may agree, in writing, upon any other rate of compensation, and thereupon such rate shall be allowed. En. March 11, 1872.

Cal. Rep. Cit. 52, 135; 140, 404.

Prac. Act, sec. 504. En. April 29, 1851.

Reference, generally: Ante, secs. 638-645.

Referees in partition, compensation of: Ante, secs. 768, 796.

Referees in probate: Post, sec. 1508.

§ 1029. Continuance, costs may be imposed as condition of. When an application is made to a court or referee to postpone a trial, the payment of costs occasioned by the postponement may be imposed, in the discretion of the court or referee, as a condition of granting the same. En. March 11, 1872.

Cal. Rep. Cit. 91, 588.

Prac. Act, sec. 505. En. April 29, 1851. Am'd. 1855, 251.

Postponement, generally: Ante, secs. 595, 596.

§ 1030. Costs when a tender is made before suit brought. When, in an action for the recovery of money only, the defendant alleges in his answer that before the commencement of the action, he tendered to the plaintiff the full amount to which he was entitled, and thereupon deposits in court for plaintiff the amount so tendered, and the allegation be found to be true, the plaintiff cannot recover costs, but must pay costs to the defendant. En. March 11, 1872.

Cal. Rep. Cit. 144, 117.

Prac. Act, sec. 506. En. April 29, 1851.

Tender: Post, sec. 2076.

Offer to compromise: Ante, sec. 997.

§ 1031. Costs in action by or against an administrator, etc. In an action prosecuted or defended by an executor, administrator, trustee of express trust, or a person expressly authorized by statute, costs may be recovered as in action by and against a person prosecuting or defending, in his own right; but such costs must by the judgment be made chargeable only upon the estate, fund, or party represented, unless the court directs the same to be paid by the plaintiff or defendant, personally, for mismanagement or bad faith in the action or defense. En. March 11, 1872.

Cal. Rep. Cit. 93, 572; 99, 479; 103, 253; 126, 371; 128, 337.

Prac. Act, sec. 507. En. April 29, 1851.

Costs against executor, etc.: Post, sec. 1509.

§ 1032. Costs in a review other than by appeal. When the decision of a court of inferior jurisdiction in a special proceeding is brought before a court of higher jurisdiction for a review, in any other way than by appeal, the same costs must be allowed as in cases on appeal, and may be collected by execution, or in such manner as the court may direct, according to the nature of the case. En. March 11, 1872.

Prac. Act, sec. 508. En. April 29, 1851.

Special proceedings, generally: Post, secs. 1063-1821.

Costs on appeal: Ante, sec. 1027; post, sec. 1034.

§ 1033. Filing of, and affidavit to, bill of costs. The party in whose favor judgment is rendered, and who claims his costs, must deliver to the clerk, and serve upon the adverse party, within five days after the verdict or notice of the decision of the court or referee, or, if the entry of the judgment on the verdict or decision be stayed, then before such entry is made, a memorandum of the items of his costs and necessary disbursements in the action or proceeding, which memorandum must be verified by the oath of the party, or his attorney or agent, or by the clerk of his attorney, stating that to the best of his knowledge and belief the items are correct, and that the disbursements have been necessarily incurred in the action or proceeding. A party dissatisfied with the costs claimed, may, within five days after notice of filing of the bill of costs, file a motion to have the same taxed by the court in which the judgment

was rendered, or by the judge thereof at chambers. By the decision of the court or referee, herein referred to, is meant the signing and filing of the findings of fact and conclusions of law. En. March 11, 1872. Am'd. 1873-4, 343; 1899, 22.

Cal. Rep. Cit. 57, 231; 59, 583; 63, 55; 69, 561; 71, 260; 71, 261; 90, 337; 90, 563; 95, 644; 106, 205; 108, 286; 110, 620; 120, 127; 129, 245; 130, 300; 130, 390; 134, 640.

Prac. Act, sec. 510. En. April 29, 1851. Am'd. 1855, 251.

Cal. Rep. Cit. 11, 341; 16, 418; 24, 352; 24, 353; 28, 420; 30, 547; 64, 590; 71, 259; 71, 260; 71, 261; 129, 245.

§ 1034. Costs on appeal, how claimed and recovered. Whenever costs are awarded to a party by an appellate court, if he claims such costs, he must, within thirty days after the remittitur is filed with the clerk below, deliver to such clerk a memorandum of his costs, verified as prescribed by the preceding section, and thereafter he may have an execution therefor as upon a judgment. En. March 11, 1872.

Cal. Rep. Cit. 59, 583; 74, 107; 118, 114.

Remittitur: Ante, sec. 958.

§ 1035. Interest and costs must be included by the clerk in the judgment. The clerk must include in the judgment entered up by him, any interest on the verdict or decision of the court, from the time it was rendered or made, and the costs, if the same have been taxed or ascertained; and he must, within two days after the same are taxed or ascertained, if not included in the judgment, insert the same in a blank, left in the judgment for that purpose, and must make a similar insertion of the costs in the copies and docket of the judgment. En. March 11, 1872.

Cal. Rep. Cit. 71, 260; 71, 261; 82, 185; 88, 394; 90, 386; 95, 143; 108, 286; 128, 575; 130, 390; 141, 697.

Prac. Act, sec. 511. En. April 1829, 1851. Am'd. 1861, 494.

Cal. Rep. Cit. 28, 420; 30, 547; 33, 678; 71, 259; 71, 260.

§ 1036. When plaintiff is a nonresident or foreign corporation, defendant may require security for costs. When the plaintiff in an action or special proceeding resides out of the state, or is a foreign corporation, security for the costs and charges, which may be awarded against such plaintiff, may be required by the defendant. When re-

quired, all proceedings in the action or special proceeding must be stayed until an undertaking, executed by two or more persons, is filed with the clerk, to the effect that they will pay such costs and charges as may be awarded against the plaintiff by judgment, or in the progress of the action or special proceeding, not exceeding the sum of three hundred dollars. A new or an additional undertaking may be ordered by the court or judge, upon proof that the original undertaking is insufficient security, and proceedings in the action or special proceeding stayed until such new or additional undertaking is executed and filed. En. March 11, 1872. Am'd. 1903, 187.

Cal. Rep. Cit. 56, 251; 62, 42; 93, 509; 118, 660; 118, 661; 118, 662; 118, 663; 137, 449.

Prac. Act, sec. 512. En. April 29, 1851.

Qualification of sureties: Post, sec. 1057.

§ 1037. If such security be not given, the action may be dismissed. After lapse of thirty days from the service of notice that security is required, or of an order for new or additional security, upon proof thereof, and that no undertaking as required has been filed, the court or judge may order the action or special proceeding to be dismissed. En. March 11, 1872. Am'd. 1903.

Cal. Rep. Cit. 93, 509; 118, 661; 137, 449.

Prac. Act, sec. 514. En. April 29, 1851.

§ 1038. Costs when state is a party. When the state is a party, and costs are awarded against it, they must be paid out of the state treasury. En. March 11, 1872.

Cal. Rep. Cit. 116, 494; 145, 767.

No security required of state: Post, sec. 1053.

§ 1039. Costs when county is a party. When a county is a party, and costs are awarded against it, they must be paid out of the county treasury. En. March 11, 1872.

Cal. Rep. Cit. 106, 205; 116, 494.

No security required of county: Post, sec. 1053.

CHAPTER VII.

GENERAL PROVISIONS.

- § 1045. Lost papers, how supplied.
- § 1046. Papers without the title of the action, or with defective title, may be valid.
- § 1047. Successive actions on the same contract, etc.
- § 1048. Consolidation of several actions into one.
- § 1049. Actions, when deemed pending.
- § 1050. Actions to determine adverse claims, and by sureties.
- § 1051. Testimony, when to be taken by the clerk.
- § 1052. The clerk must keep a register of actions.
- § 1053. Two of three referees, etc., may do any act.
- § 1054. The time within an act is to be done may be extended.
- § 1055. Actions against a sheriff for official acts.
- § 1056. Corporations may become sureties on undertakings and bonds.
- § 1057. Undertakings mentioned in this code, requisites of.
- § 1058. People of state not required to give bonds when state is a party.
- § 1059. Surety on appeal substituted to rights of judgment creditor.

§ 1045. Lost papers, how supplied. If an original pleading or paper be lost, the court may authorize a copy thereof to be filed and used instead of the original. En. March 11, 1872.

Cal. Rep. Cit. 93, 608; 110, 190; 137, 272.

Lost certificates of deposit, statute relating to actions on: See post, Appendix, title Statute of Limitations.

§ 1046. Papers without the title of the action, or with defective title, may be valid. An affidavit, notice, or other paper, without the title of the action or proceeding in which it is made or with a defective title, is as valid and effectual for any purpose as if duly entitled, if it intelligibly refer to such action or proceeding. En. March 11, 1872.

Cal. Rep. Cit. 67, 122; 95, 417; 100, 335; 101, 122.

Prac. Act, sec. 531. En. April 29, 1851.

Cal. Rep. Cit. 3, 97.

§ 1047. Successive actions on the same contract, etc. Successive actions may be maintained upon the same contract or transaction, whenever, after the former action, a new cause of action arises therefrom. En. March 11, 1872.

Prac. Act, sec. 525. En. April 29, 1851.

Action defined: Ante, sec. 22.

§ 1048. Consolidation of several actions into one. Whenever two or more actions are pending at one time between the same parties and in the same court, upon causes of action which might have been joined, the court may order the actions to be consolidated. En. March 11, 1872.

Cal. Rep. Cit. 66, 73; 80, 324; 126, 650.

Prac. Act, sec. 526. En. April 29, 1851.

§ 1049. Actions, when deemed pending. An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied. En. March 11, 1872.

Cal. Rep. Cit. 55, 320; 67, 331; 89, 541; 91, 431; 97, 550; 97, 552; 99, 88; 99, 89; 99, 475; 99, 476; 99, 627; 100, 42; 100, 646; 110, 504; 113, 63; 119, 257; 120, 24; 123, 23; 124, 428; 125, 89; 129, 650; 130, 599; 131, 646; 134, 468; 134, 469; 137, 144; 137, 145; 143, 113; 143, 226; 143, 235; 143, 633.

§ 1050. Actions to determine adverse claims, and by sureties. An action may be brought by one person against another for the purpose of determining an adverse claim, which the latter makes against the former for money or property upon an alleged obligation; and also against two or more persons, for the purpose of compelling one to satisfy a debt due to the other, for which plaintiff is bound as a surety. En. March 11, 1872.

Cal. Rep. Cit. 92, 420; 96, 101; 117, 436; 121, 351; 132, 158; 136, 29; 137, 114; 138, 559; 145, 193.

Prac. Act, sec. 527. En. April 29, 1851.

Cal. Rep. Cit. 5, 84; 24, 165; 24, 166.

Quieting title to realty: Ante, secs. 738 et seq.

Surety may compel principal to perform obligation: See Civ. Code, sec. 2846.

§ 1051. Testimony, when to be taken by the clerk. On the trial of an action in a court of record, if there is no shorthand reporter of the court in attendance, either party may require the clerk to take down the testimony in writing. En. March 11, 1872.

Cal. Rep. Cit. 121, 669.

§ 1052. The clerk must keep a register of actions. The clerk must keep among the records of the court a register of actions. He must enter therein the title of the action,

with brief notes under it, from time to time, of all papers filed and proceedings had therein. En. March 11, 1872.

Cal. Rep. Cit. 99, 514; 126, 649.

Prac. Act, sec. 528. En. April 29, 1851.

Records of the court: Ante, secs. 668, 672, 683.

§ 1053. Two of three referees, etc., may do any act. When there are three referees, or three arbitrators, all must meet, but two of them may do any act which might be done by all. En. March 11, 1872.

Prac. Act, sec. 529. En. April 29, 1851.

References and trials by referees: Ante, secs. 638-645.

Arbitrations, generally: Post, secs. 1281-1290.

§ 1054. The time within which an act is to be done may be extended. When an act to be done, as provided in this code, relates to the pleadings in the action, or the undertakings to be filed, or the justification of sureties, or the preparation of statements, or of bills of exceptions, or of amendments thereto, or to the service of notice other than of appeal, the time allowed by this code may be extended, upon good cause shown, by the judge of the superior court in and for the county in which the action is pending, or by the judge who presided at the trial of said action; but such extension shall not exceed thirty days, without the consent of the adverse party; except that when it appears to the judge to whom said application is made, that the attorney of record for the party applying for said extension is actually engaged in attendance upon a session of the legislature of this state, as a member thereof; in which case it shall be the duty of said judge to extend said time until said session of the legislature adjourns, and thirty days thereafter. En. March 11, 1872. Am'd. 1873-4, 344; 1880, 7; 1889, 45; 1895, 12.

Cal. Rep. Cit. 57, 503; 57, 632; 61, 506; 64, 463; 64, 540; 65, 236; 67, 602; 68, 487; 68, 488; 68, 489; 70, 391; 71, 584; 74, 105; 83, 320; 83, 644; 83, 645; 84, 539; 86, 76; 89, 612; 91, 491; 99, 480; 129, 280; 129, 691; 134, 49; 135, 661; 136, 557; 138, 52; 147, 720.

Prac. Act, sec. 530. En. April 29, 1851. Am'd. 1861, 591.

Cal. Rep. Cit. 27, 112; 27, 113; 27, 114; 27, 338; 28, 240; 32, 350; 43, 321; 43, 322.

Time, extension of: Ante, sec. 473.

Computation of time: See ante, sec. 12.

C. C. P., 1906.

§ 1054. When an act to be done, as provided in this code, relates to the pleadings in the action, or the undertakings to be filed, or the justifications of sureties, or the preparation of statements, or of bills of exceptions, or of amendments thereto, or to the service of notices other than of appeal, the time allowed by this code may be extended, upon good cause shown, by the judge of the superior court in and for the country in which the action is pending, or by the judge who presided at the trial of said action; but such extension shall not exceed thirty days, without the consent of the adverse party; except that when it appears to the judge to whom said application is made that the attorney of record for the party applying for said extension is actually engaged in attendance upon a session of the legislature of this state, as a member thereof; in which case it shall be the duty of said judge to extend said time until said session of the legislature adjourns, and thirty days thereafter: provided, however, that from and after the passage of this act to and including the twenty-eighth day of February, nineteen hundred and seven, the judge shall have power to extend the foregoing time as to any matter enumerated in this section for not exceeding ninety days, and shall also have power during said period to extend by order, for not exceeding ninety days, the time for filing and serving notices of appeal and for the performance of any act in any action or special proceeding required by this code to be done within a specified time. [In effect June 3, 1905.]

§ 1055. Actions against a sheriff for official acts. If
§1055 an action be brought against a sheriff for an act done by
Am'd. virtue of his office, and he give written notice there-
p. 475 of to the sureties on any bond of indemnity received by
him, the judgment recovered therein shall be conclusive
evidence of his right to recover against such sureties; and
the court may, on motion, upon notice of five days, order
judgment to be ordered up against them for the amount so
recovered, including costs. En. March 11, 1872. Am'd.
1880, 73.

Cal. Rep. Cit. 102, 279; 102, 280; 102, 281; 102, 282; 142,
207.

Prac. Act, sec. 645. En. April 29, 1851.

Cal. Rep. Cit. 21, 442; 28, 102.

§ 1056. Corporations may become sureties on undertak-
ings and bonds. In all cases where an undertaking or
bond, with any number of sureties, is authorized or required
by any provision of this code, or of any law of this state,
any corporation with a paid-up capital of not less than one
hundred thousand dollars, incorporated under the laws of
this or any other state of the United States for the purpose
of making, guaranteeing, or becoming a surety upon bonds
or undertakings required or authorized by law, or which,
by the laws of the state where it was originally incorpo-
rated has such power, and which shall have complied with
all the requirements of the law of this state regulating the
formation or admission of these corporations to transact
such business in this state, may become and shall be ac-
cepted as security or as sole and sufficient surety upon such
undertaking or bond, and such corporate surety shall be
subject to all the liabilities and entitled to all the rights of
natural persons' sureties; provided, that the insurance
commissioner shall have the same jurisdiction and powers
to examine the affairs of such corporations as he has in
other cases; shall require them to file similar statements
and issue to them a similar certificate. And whenever the
liabilities of any such corporation shall exceed its assets,
the insurance commissioner shall require the deficiency
to be paid up in sixty days, and if it is not so paid up,
then he shall issue a certificate showing the extent of such
deficiency, and he shall publish the same once a week for
three weeks, in a daily San Francisco paper. And, until
such deficiency is paid up, such company shall not do

business in this state. In estimating the condition of any such company, the commissioner shall allow as assets only such as are allowed under existing laws at the time, and shall charge as liabilities, in addition of eighty per cent of the capital stock, all outstanding indebtedness of the company, and a premium reserve equal to fifty per centum of the premiums charged by said company on all risks then in force. En. March 11, 1872. Rep. 1880, 111. En. 1889, 215.

Cal. Rep. Cit. 95, 599; 95, 600; 97, 355; 97, 357; 97, 359.

Prac. Act, sec. 646. En. April 29, 1851. Am'd. 1857, 29; 1862, 567.

The act of March 12, 1885, Stats. 1885, p. 114, permitted a corporation to act as sole surety: See post, Appendix, title Bonds.

§ 1057
Am'd.
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§ 1057. Undertakings mentioned in this code, requisites of. In any case where an undertaking or bond is authorized or required by any law of this state, the officer taking the same must, except in the case of such a corporation as is mentioned in the next preceding section, require the sureties to accompany it with an affidavit that they are each residents and householders, or freeholders, within the state, and are each worth the sum specified in the undertaking or bond, over and above all their just debts and liabilities, exclusive of property exempt from execution; but when the amount specified in the undertaking or bond exceeds three thousand dollars, and there are more than two sureties thereon, they may state in their affidavits that they are severally worth amounts less than the amount specified in the undertaking or bond, if the whole amount be equivalent to that of two sufficient sureties. Any corporation such as is mentioned in the next preceding section, may become one of such sureties. No such corporation shall be accepted in any case as a surety whenever its liabilities shall exceed its assets as ascertained in the manner provided in section ten hundred and fifty-six. En. March 11, 1872. Am'd. 1889, 216.

Cal. Rep. Cit. 52, 448; 97, 355; 97, 356; 97, 358; 97, 359; 106, 46; 122, 208; 128, 669.

Prac. Act, sec. 513. En. April 29, 1851.

Prac. Act, sec. 567. En. April 29, 1851. Am'd. 1871-2, 190.

Applied to guardians: Post, sec. 1809.

§ 1058. People of state not required to give bonds when state is a party. In any civil action or proceeding wherein the state, or the people of the state, is a party plaintiff, or any state officer, in his official capacity, or in behalf of the state, or any county, city and county, city, or town, is a party plaintiff or defendant, no bond, written undertaking, or security can be required of the state, or the people thereof, or any officer thereof, or of any county, city and county, city, or town; but on complying with the other provisions of this code, the state, or the people thereof, or any state officer acting in his official capacity, have the same rights, remedies, and benefits as if the bond, undertaking, or security were given and approved as required by this code. En. March 11, 1872. Am'd. 1880, 76.

Cal. Rep. Cit. 60, 346; 60, 347; 78, 445; 111, 273; 116, 493; 120, 304; 130, 61; 137, 373; 137, 374; 141, 357.

Costs against state or county: Ante, secs. 1038, 1039.

§ 1059. Surety on appeal substituted to rights of judgment creditor. Whenever any surety on an undertaking on appeal, executed to stay proceedings upon a money judgment, pays the judgment, either with or without action, after its affirmation by the appellate court, he is substituted to the rights of the judgment creditor, and is entitled to control, enforce, and satisfy such judgment in all respects as if he had recovered the same. En. Stats. 1873-4, 344.

Cal. Rep. Cit. 67, 243; 117, 6.

PART III.

OF SPECIAL PROCEEDINGS OF A CIVIL NATURE.

Preliminary Provisions, §§ 1063-1064.

- Title I. Of Writs of Review, Mandate and Prohibition, §§ 1067-1110.
- II. Of Contesting Certain Elections, §§ 1111-1127.
 - III. Of Summary Proceedings, §§ 1132-1179.
 - IV. Of the Enforcement of Liens, §§ 1180-1207.
 - V. Of Contempts, §§ 1209-1222.
 - VI. Of the Voluntary Dissolution of Corporations, §§ 1227-1234.
 - VII. Of Eminent Domain, §§ 1237-1264.
 - VIII. Of Escheated Estates, §§ 1269-1272.
 - IX. Of Change of Name, §§ 1275-1279.
 - X. Of Arbitrations, §§ 1281-1290.
 - XI. Of Proceedings in Probate Courts, §§ 1294-1810.
 - XII. Of Sole Traders, §§ 1811-1821.
 - XIII. Of Proceedings in Insolvency, § 1822.

PRELIMINARY PROVISIONS.

§ 1063. Parties, how designated.

§ 1064. Judgment and order same meaning as in civil actions.

§ 1063. Parties, how designated. The party prosecuting a special proceeding may be known as the plaintiff, and the adverse party as the defendant. En. March 11, 1872.

Cal. Rep. Cit. 92, 248; 141, 98.

Plaintiff and defendant: Ante, sec. 308.

§ 1064. Judgment and order same meaning as in civil actions. A judgment in a special proceeding is the final determination of the rights of the parties therein. The definitions of a motion and an order in a civil action are applicable to similar acts in a special proceeding. En. March 11, 1872.

Judgment, definition of: Ante, sec. 577.

Motion and order: Ante, sec. 1003.

TITLE I.

OF WRITS OF REVIEW, MANDATE AND PROHIBITION.

Chapter I. Writ of Review, §§ 1067-1077.

II. Writ of Mandate, §§ 1084-1097.

III. Writ of Prohibition, §§ 1102-1105.

IV. Writs of Review, Mandate, and Prohibition
May Issue and be Heard at Chambers, § 1108.

V. Rules of Practice and Appeals, §§ 1109-1110.

CHAPTER I.

WRIT OF REVIEW.

§ 1067. Writ of review defined.

§ 1068. When and by what courts granted.

§ 1069. Application for, how made.

§ 1070. The writ to be directed to the inferior tribunal, etc.

§ 1071. Contents of the writ.

§ 1072. Proceedings in inferior court may be stayed, or not.

§ 1073. Service of the writ.

§ 1074. The review under the writ, extent of.

§ 1075. A defective return of the writ may be perfected. Hearing
and judgment.

§ 1076. Copy of judgment must be sent to the inferior tribunal.

§ 1077. Judgment-rolls.

§ 1067. Writ of review defined. The writ of certiorari may be denominated the writ of review. En. March 11, 1872. Am'd. 1873-4, 345.

Cal. Rep. Cit. 141, 617.

Prac. Act, sec. 455. En. April 29, 1851.

§ 1068. When and by what courts granted. A writ of review may be granted by any court, except a police or justice's court, when an inferior tribunal, board, or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board, or officer, and there is no appeal, nor, in the judgment of the court, any plain, speedy, and adequate remedy. En. March 11, 1872.

Cal. Rep. Cit. 53, 393; 53, 550; 54, 376; 54, 604; 58, 361; 59, 701; 60, 290; 65, 189; 71, 323; 74, 219; 84, 644; 96, 119; 97, 326; 101, 17; 108, 305; 109, 526; 110, 57; 113, 668; 120, 514; 124, 277; 127, 419; 131, 280; 138, 429; 140, 2; 140, 514; 141, 318; 141, 617; 144, 506; 145, 475.

Prac. Act, sec. 456. En. April 29, 1851.

Cal. Rep. Cit. 3, 249; 5, 478; 14, 496; 16, 213; 21, 169; 25, 96; 29, 635; 42, 254; 42, 255; 43, 26; 43, 367; 47, 605.

Certiorari, extent of review on: Post, sec. 1074.

Supreme court is always open for issuing this writ: Ante, sec. 47.

Court commissioners, power to hear and determine ex parte motions for writ: Ante, sec. 259.

Returnable—Writ may be made returnable at any time: Post, sec. 1108. See post, sec. 1070.

§ 1069. Application for, how made. The application must be made on affidavit by the party beneficially interested, and the court may require a notice of the application to be given to the adverse party, or may grant an order to show cause why it should not be allowed, or may grant the writ without notice. En. March 11, 1872.

Cal. Rep. Cit. 53, 392; 71, 237; 87, 175; 131, 365; 136, 687; 144, 508.

Prac. Act, sec. 457. En. April 29, 1851.

Issuance: See supreme court rule 26.

§ 1070. The writ to be directed to the inferior tribunal, etc. The writ may be directed to the inferior tribunal, board, or officer, or to any other person having the custody of the record or proceedings to be certified. When directed to a tribunal, the clerk, if there be one, must return the writ with the transcript required. En. March 11, 1872.

Cal. Rep. Cit. 61, 627; 75, 372; 113, 671; 143, 172.

Prac. Act, sec. 458. En. April 29, 1851.

•§ 1071. Contents of the writ. The writ of review must command the party to whom it is directed to certify fully to the court issuing the writ, at a specified time and place, a transcript of the record and proceedings (describing or referring to them with convenient certainty), that the same may be reviewed by the court; and requiring the party, in the meantime, to desist from further proceedings in the matter to be reviewed. En. March 11, 1872.

Cal. Rep. Cit. 54, 322; 61, 55; 143, 172.

Prac. Act, sec. 459. En. April 29, 1851.

§ 1072. Proceedings in inferior court may be stayed, or not. If a stay of proceedings be not intended, the words requiring the stay must be omitted from the writ; these words may be inserted or omitted, in the sound discretion

of the court, but if omitted, the power of the inferior court or officer is not suspended or the proceedings stayed. En. March 11, 1872.

Prac. Act, sec. 460. En. April 29, 1851.

§ 1073. Service of the writ. The writ must be served in the same manner as a summons in civil action, except when otherwise expressly directed by the court. En. March 11, 1872.

Prac. Act, sec. 461. En. April 29, 1851.

Service of writ, on public tribunal, etc., and proof of same: Supreme court rule 28.

Service of summons: Ante, secs. 410 et seq.

§ 1074. The review under the writ, extent of. The review upon this writ cannot be extended further than to determine whether the inferior tribunal, board, or officer has regularly pursued the authority of such tribunal, board, or officer. En. March 11, 1872.

Cal. Rep. Cit. 54, 286; 97, 326; 111, 273; 113, 668; 136, 367.

Prac. Act, sec. 462. En. April 29, 1851.

Cal. Rep. Cit. 25, 96; 29, 635; 43, 367.

§ 1075. A defective return of the writ may be perfected. Hearing and judgment. If the return of the writ be defective, the court may order a further return to be made. When a full return has been made, the court must hear the parties, or such of them as may attend for that purpose, and may thereupon give judgment, either affirming, or annulling, or modifying the proceedings below. En. March 11, 1872.

Cal. Rep. Cit. 56, 614.

Prac. Act, sec. 463. En. April 29, 1851.

Cal. Rep. Cit. 25, 96.

§ 1076. Copy of judgment must be sent to the inferior tribunal. A copy of the judgment, signed by the clerk, must be transmitted to the inferior tribunal, board, or officer having the custody of the record or proceeding, certified up. En. March 11, 1872.

Prac. Act, sec. 464. En. April 29, 1851.

§ 1077. Judgment-rolls. A copy of the judgment, signed by the clerk, entered upon or attached to the writ and return, constitute the judgment-roll. En. March 11, 1872.

Cal. Rep. Cit. 47, 605; 61, 55; 115, 85.

Prac. Act, sec. 465. En. April 29, 1851.

Cal. Rep. Cit. 37, 456; 46, 9.

CHAPTER II.

WRIT OF MANDATE.

§ 1084. Mandate defined.

§ 1085. When and by what court issued.

§ 1086. Writ, when and upon what to issue.

§ 1087. Must be either alternative or peremptory. Substance.

§ 1088. If the application be without notice, the alternative writ may issue; otherwise, the peremptory. Notice and default.

§ 1089. The adverse party may answer under oath.

§ 1090. If an essential question of fact is raised, the court may order a jury trial.

§ 1091. The applicant may demur to the answer or countervail it by proof.

§ 1092. Motion for new trial, where made.

§ 1093. The clerk must transmit the verdict to the court where the motion is pending, after which the hearing shall be had on motion.

§ 1094. If no answer be made, or if the answer raise no material issue of fact, the hearing must be before the court.

§ 1095. If the applicant succeed, he may have damages, costs, and a peremptory mandate.

§ 1096. Service of the writ.

§ 1097. Penalty for disobedience to the writ.

§ 1084. Mandate defined. The writ of mandamus may be denominated a writ of mandate. En. March 11, 1872. Am'd. 1873-4, 345.

Prac. Act, sec. 466. En. April 29, 1851.

§ 1085. When and by what court issued. It may be issued by any court, except a justice's or police court, to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law, specially enjoins, as a duty resulting from an office, trust, or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board, or person. En. March 11, 1872.

Cal. Rep. Cit. 52, 9; 55, 329; 57, 76; 66, 595; 66, 633; 66, 659; 73, 58; 82, 491; 91, 485; 93, 88; 105, 154; 116, 266;

117, 358; 121, 554; 124, 86; 126, 679; 135, 276; 135, 488;
135, 625; 139, 232; 144, 769; 145, 46.

Prac. Act, sec. 467. En. April 29, 1851.

Cal. Rep. Cit. 24, 82; 44, 174; 44, 175.

Supreme court always open: Ante, sec. 47.

Superior court always open: Ante, sec. 73. Hearing, etc.,
at chambers: Ante, sec. 166.

Court commissioners, power to hear and determine ex
parte motions for writ: Ante, sec. 259.

Returnable, when may be made: Post, sec. 1108.

§ 1086. Writ, when and upon what to issue. The writ must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law. It must be issued upon affidavit, on the application of the party beneficially interested. En. March 11, 1872. §1086
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Cal. Rep. Cit. 50, 510; 55, 330; 62, 617; 71, 45; 71, 312; 76, 276; 87, 173; 87, 174; 87, 175; 108, 305; 118, 392; 126, 679; 135, 14; 135, 625; 144, 115; 144, 508; 144, 527; 145, 513.

Prac. Act, sec. 468. En. April 29, 1851.

Cal. Rep. Cit. 3, 174; 4, 388, 24, 82; 25, 29; 25, 30; 36, 287; 44, 175.

Issuance by supreme court: See supreme court rule 28.

§ 1087. Must be either alternative or peremptory. Substance. The writ may be either alternative or peremptory. The alternative writ must state generally the allegation against the party to whom it is directed, and command such party, immediately after the receipt of the writ, or at some other specified time, to do the act required to be performed, or to show cause before the court at a specified time and place, why he has not done so. The peremptory writ must be in a similar form, except that the words requiring the party to show cause why he has not done as commanded must be omitted, and a return day inserted. En. March 11, 1872. §1087
Am'd.
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Prac. Act, sec. 469. En. April 29, 1851.

Peremptory writ, without alternative: Sec. 1088.

Alternative writ: Supreme court rule 26.

Compelling clerk to enter names on great register: See Pol. Code, secs. 1108, 1110.

§1088 Am'd. p. 476 § 1088. If the application be without notice, the alternative writ may issue; otherwise, the peremptory. Notice and default. When the application to the court is made without notice to the adverse party, and the writ be allowed, the alternative must be first issued; but if the application be upon due notice and the writ be allowed, the peremptory may be issued in the first instance. The notice of the application, when given, must be at least ten days. The writ cannot be granted by default. The case must be heard by the court, whether the adverse party appear or not. En. March 11, 1872.

Cal. Rep. Cit. 62, 506; 107, 390; 107, 391; 129, 400; 134, 509.

Prac. Act, sec. 470. En. April 29, 1851.

Proof of service, on public body: Supreme court rule 28.

§1089 Am'd. p. 476 § 1089. The adverse party may answer under oath. On the return of the alternative, or the day on which the application for the writ is noticed, the party on whom the writ or notice has been served may show cause by answer under oath, made in the same manner as an answer to a complaint in a civil action. En. March 11, 1872.

Prac. Act, sec. 471. En. April 29, 1851.

Answer: Ante, sec. 437.

§ 1090. If an essential question of fact is raised, the court may order a jury trial. If an answer be made, which raises a question as to a matter of fact essential to the determination of the motion, and affecting the substantial rights of the parties, and upon the supposed truth of the allegation of which the application for the writ is based, the court may, in its discretion, order the question to be tried before a jury, and postpone the argument until such trial can be had, and the verdict certified to the court. The question to be tried must be distinctly stated in the order for trial, and the county must be designated in which the same shall be had. The order may also direct the jury to assess any damages which the applicant may have sustained, in case they find for him. En. March 11, 1872.

Cal. Rep. Cit. 81, 546.

Prac. Act, sec. 472. En. April 29, 1851.

Cal. Rep. Cit. 9, 20.

§ 1091. The applicant may demur to the answer or countervail it by proof. On the trial the applicant is not precluded by the answer from any valid objection to its sufficiency, and may countervail it by proof, either in direct denial or by way of avoidance. En. March 11, 1872.

Cal. Rep. Cit. 135, 276.

Prac. Act, sec. 473. En. April 29, 1851.

§ 1092. Motion for new trial, where made. The motion for a new trial must be made in the court in which the issue of fact is tried. En. March 11, 1872.

Prac. Act, sec. 474. En. April 29, 1851.

§ 1093. The clerk must transmit the verdict to the court where the motion is pending, after which the hearing shall be had on motion. If no notice of a motion for a new trial be given, or, if given, the motion be denied, the clerk, within five days after rendition of the verdict or denial of the motion, must transmit to the court in which the application for the writ is pending, a certified copy of the verdict attached to the order of trial; after which either party may bring on the argument of the application, upon reasonable notice to the adverse party. En. March 11, 1872.

Prac. Act, sec. 475. En. April 29, 1851.

§ 1094. If no answer be made, or if the answer raise no material issue of fact, the hearing must be before the court. If no answer be made, the case must be heard on the papers of the applicant. If the answer raises only questions of law, or puts in issue immaterial statements, not affecting the substantial rights of the parties, the court must proceed to hear or fix a day for hearing the argument of the case. En. March 11, 1872. Am'd. 1873-4, 345.

Cal. Rep. Cit. 107, 390; 129, 400.

Prac. Act, sec. 476. En. April 29, 1851.

§ 1095. If the applicant succeed, he may have damages, costs, and a peremptory mandate. If judgment be given for the applicant, he may recover the damages which he has sustained, as found by the jury, or as may be determined by the court or referee, upon a reference to be ordered, together with costs; and for such damages and

costs an execution may issue; and a peremptory mandate must also be awarded without delay. En. March 11, 1872.

Cal. Rep. Cit. 123, 152; 123, 153.

Prac. Act, sec. 477. En. April 29, 1851.

Cal. Rep. Cit. 123, 153.

Costs: Ante, secs. 1021 et seq.

§ 1096. **Service of the writ.** The writ must be served in the same manner as a summons in a civil action, except when otherwise expressly directed by order of the court. Service upon a majority of the members of any board or body, is service upon the board or body, whether at the time of the service the board or body was in session or not. En. March 11, 1872.

Prac. Act, sec. 478. En. April 29, 1851.

Service of summons: Ante, secs. 410 et seq.

§ 1097. **Penalty for disobedience to the writ.** When a peremptory mandate has been issued and directed to any inferior tribunal, corporation, board, or person, if it appear to the court that any member of such tribunal, corporation, or board, or such person upon whom the writ has been personally served, has, without just excuse, refused or neglected to obey the same, the court may, upon motion, impose a fine not exceeding one thousand dollars. In case of persistence in a refusal of obedience, the court may order the party to be imprisoned until the writ is obeyed, and may make any orders necessary and proper for the complete enforcement of the writ. En. March 11, 1872. Am'd. 1873-4, 345.

Prac. Act, sec. 479. En. April 29, 1851.

Contempt, generally: Post, secs. 1209 et seq.

CHAPTER III.

WRIT OF PROHIBITION.

- § 1102. Prohibition defined.
- § 1103. Where and when issued.
- § 1104. Writ may be alternative or peremptory. Form of.
- § 1105. Certain provisions of the preceding chapter applicable.

§ 1102. Prohibition defined. The writ of prohibition is the counterpart of the writ of mandate. It arrests the proceedings of any tribunal, corporation, board, or person, whether exercising functions judicial or ministerial, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board, or person. En. March 11, 1872. Am'd. 1881, 20.

Cal. Rep. Cit. 47, 82; 47, 585; 53, 292; 54, 88; 57, 553; 57, 554; 58, 323; 59, 662; 66, 27; 68, 402; 69, 108; 84, 389; 92, 251; 110, 58; 122, 216; 126, 221; 146, 310.

Mandate: Ante, secs. 1084 et seq.

§ 1103. Where and when issued. It may be issued by any court except police or justices' courts, to an inferior tribunal or to a corporation, board, or person, in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law. It is issued upon affidavit, on the application of the person beneficially interested. En. March 11, 1872. §1103
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Cal. Rep. Cit. 58, 324; 59, 663; 66, 27; 69, 108; 84, 389; 85, 50; 90, 103; 92, 251; 108, 305; 110, 58; 122, 216; 133, 365; 137, 109.

Seal necessary to a writ: Ante, sec. 153.

§ 1104. Writ may be alternative or peremptory. Form of. The writ must be either alternative or peremptory. The alternative writ must state generally the allegation against the party to whom it is directed, and command such party to desist or refrain from further proceedings in the action or matter specified therein, until the further order of the court from which it is issued, and to show cause before such court, at a specified time and place, why such party should not be absolutely restrained from any further proceedings in such action or matter. The peremptory writ must be in a similar form, except that the words requiring §1104
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the party to show cause why he should not be absolutely restrained, etc., must be omitted, and a return day inserted. En. March 11, 1872.

Compare sec. 1087.

§ 1105. Certain provisions of the preceding chapter applicable. The provisions of the preceding chapter, except of the first four sections thereof, apply to this proceeding. En. March 11, 1872.

Cal. Rep. Cit. 88, 267.

CHAPTER IV.

WRITS OF REVIEW, MANDATE, AND PROHIBITION MAY ISSUE AND BE HEARD AT CHAMBERS.

§ 1108. Writs of review, mandate, and prohibition may issue and be heard at chambers.

§ 1108. Writs of review, mandate, and prohibition may issue and be hard at chambers. Writs of review, mandate, and prohibition issued by the supreme court, or by a superior court, may, in the discretion of the court issuing the writ, be made returnable and a hearing thereon be had at any time. En. March 11, 1872. Am'd. 1873-4, 346; 1880, 74.

Cal. Rep. Cit. 45, 243.

Powers of judges at chambers: Ante, secs. 165, 166.

CHAPTER V.

RULES OF PRACTICE AND APPEALS.

§ 1109. Certain provisions of part two applicable.

§ 1110. Same.

§ 1109. Certain provisions of part two applicable. Except as otherwise provided in this title, the provisions of part two of this code, are applicable to, and constitute the rules of practice in the proceedings mentioned in this title. En. March 11, 1872.

Cal. Rep. Cit. 117, 6; 141, 97.

See ante, secs. 307 et seq.

§ 1110. Same. The provisions of part two, of this code, relative to new trials and appeals, except in so far as they are inconsistent with the provisions of this title, apply to the proceedings mentioned in this title. En. March 11, 1872.

See ante, secs. 656 et seq.; and ante, secs. 936 et seq.

TITLE II.

OF CONTESTING ELECTIONS.

- § 1111. Who may contest, and grounds of contest.
- § 1112. Irregularity and improper conduct of judges, when to annul elections.
- § 1113. When not to.
- § 1114. Illegal votes, when not to vitiate election.
- § 1115. Proceedings on contest.
- § 1116. Statement of cause of contest in illegal voting.
- § 1117. Statement of cause of contest; want of form not to vitiate.
- § 1118. Superior judge to hold special session for trial of contest.
- § 1119. Clerk to issue citation to respondent.
- § 1120. Witnesses; attendance of, how enforced.
- § 1121. Power of court. Adjournment of court.
- § 1122. Rules to govern court in trial of contest.
- § 1123. Court may declare who was elected.
- § 1124. Fees of officers and witnesses. (Repealed.)
- § 1125. Costs.
- § 1126. Appeal.
- § 1127. When election void and office vacant.

Gen. Cit. to Title.—Cal. Rep. Cit. 125, 528.

§ 1111. Who may contest, and grounds of contest. Any elector of a county, city and county, city, or of any political subdivision of either, may contest the right of any person declared elected to an office to be exercised therein, for any of the following causes:

1. For malconduct on the part of the board of judges, or any member thereof.

2. When the person whose right to the office is contested was not, at the time of the election, eligible to such office.

3. When the person whose right is contested has given to any elector or inspector, judge, or clerk of the election, any bribe or reward, or has offered any such bribe or reward for the purpose of procuring his election, or has committed any other offense against the elective franchise, defined in title four, part one, of the Penal Code.

4. On account of illegal votes. En. March 11, 1872. Am'd. 1875-6, 100.

Cal. Rep. Cit. 46, 401; 46, 403; 64, 95; 83, 71; 83, 74; 87, 124; 87, 125; 100, 201; 114, 96; 118, 400; 129, 327; 134, 152; 136, 266; 138, 152; 139, 5; 141, 413; 141, 415; 141, 559; 142, 498; 142, 592; 143, 470; 143, 472; 143, 546; 143, 547; 146, 329. Subd. 1—65, 59; 83, 73; 111, 420. Subd. 2—118, 395; 145, 692. Subd. 4—104, 661; 127, 31; 128, 284.

Malconduct of judges: Post, secs. 1112, 1113.

Legislature, contesting election of members of: Pol. Code, sec. 273; of governor, etc.: Id., sec. 288.

Office, usurpation of, etc.: Ante, secs. 802 et seq.

Offense against elective franchise: Pen. Code, secs. 41 et seq.

§ 1112. Irregularity and improper conduct of judges, when to annul elections. No irregularity or improper conduct in the proceedings of the judges, or of any of them, is such malconduct as avoids an election, unless the irregularity or improper conduct is such as to procure the person whose right to the office is contested to be declared elected, when he had not received the highest number of legal votes. En. March 11, 1872.

Cal. Rep. Cit. 83, 78; 108, 111; 124, 13; 136, 402; 143, 342; 143, 386; 143, 546; 143, 547; 143, 549.

§ 1113. When not to. When any election held for an office exercised in and for a county is contested on account of any malconduct on the part of the board of judges of any township election, or any member thereof, the election cannot be annulled and set aside upon any proof thereof, unless the rejection of the vote of such township or townships would change the result as to such office in the remaining vote of the county. En. March 11, 1872.

§ 1114. Illegal votes, when not to vitiate election. Nothing in the fourth ground of contest specified in section eleven hundred and eleven, is to be so construed as to authorize an election to be set aside on account of illegal votes, unless it appear that a number of illegal votes has been given to the person whose right to the office is contested, which, if taken from him, would reduce the number of his legal votes below the number of votes given to some other person for the same office, after deducting therefrom the illegal votes which may be shown to have been given to such other person. En. March 11, 1872.

Cal. Rep. Cit. 65, 286; 83, 73; 128, 284; 143, 547.

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§ 1115. Proceedings on contest. When an elector contests the right of any person declared elected to such office, he must, within forty days after the return day of the elec-

tion, file with the county clerk a written statement, setting forth specifically:

1. The name of the party contesting such election, and that he is an elector of the district, county, or township, as the case may be, in which such election was held;

2. The name of the person whose right to the office is contested;

3. The office;

4. The particular grounds of such contest;

—Which statement must be verified by the affidavit of the contesting party, that the matters and things therein contained are true. En. March 11, 1872.

Cal. Rep. Cit. 46, 403; 58, 207; 58, 208; 65, 59; 111, 130; 121, 479; 141, 274; 142, 504; 143, 485; 146, 329.

Statement of contestant: Post, sees. 1116, 1117.

§ 1116. Statement of cause of contest in illegal voting. When the reception of illegal votes is alleged as a cause of contest, it is sufficient to state generally that in one or more specified voting precincts illegal votes were given to the person whose election is contested, which, if taken from him, will reduce the number of his legal votes below the number of legal votes given to some other person for the same office; but no testimony can be received of any illegal votes, unless the party contesting such election deliver to the opposite party, at least three days before such trial, a written list of the number of illegal votes, and by whom given, which he intends to prove on such trial; and no testimony can be received of any illegal votes except such as are specified in such list. En. March 11, 1872. Am'd. 1880, 74.

Cal. Rep. Cit. 51, 516; 58, 211; 105, 182; 121, 534; 136, 4; 136, 277; 142, 504.

§ 1117. Statement of cause of contest; want of form not to vitiate. No statement of the grounds of contest will be rejected, nor the proceedings dismissed by any court for want of form, if the grounds of contest are alleged with such certainty as will advise the defendant of the particular proceeding or cause for which such election is contested. En. March 11, 1872.

Cal. Rep. Cit. 141, 275; 143, 21; 143, 485; 145, 318.

§ 1118. Superior judge to hold special session for trial of contest. Upon the statement being filed, the county

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clerk must inform the superior court of the county thereof, which shall thereupon order a special session of such court to be held at the courtroom, on some day to be named by it, not less than ten nor more than twenty days from the date of such order, to hear and determine such contested election. En. March 11, 1872. Am'd. 1880, 75.

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Cal. Rep. Cit. 119, 614; 119, 616; 143, 21.

§ 1119. Clerk to issue citation to respondent. The clerk shall thereupon issue a citation for the person, whose right to the office is contested, to appear at the time and place specified in the order, which citation must be delivered to the sheriff, and served either upon the party in person, or, if he cannot be found, by leaving a copy thereof at the house where he last resided, at least five days before the time so specified. En. March 11, 1872. Am'd. 1880, 75.

§ 1120. Witnesses; attendance of, how enforced. The clerk must issue subpoenas for witnesses at the request of either party, which must be served as other subpoenas; and the superior court shall have full power to issue attachments to compel the attendance of witnesses who have been subpoenaed to attend. En. March 11, 1872. Am'd. 1880, 75.

Subpoenas, issuance, service, etc.: Post, secs. 1985-1987; also see post, secs. 1988-1990; disobedience, penalty, etc.: Post, secs. 1991-1992.

Compelling attendance of witnesses: Post, secs. 1993 et seq.

§ 1121. Power of court. Adjournment of court. The court must meet at the time and place designated, to determine such contested election, and shall have all the powers necessary to the determination thereof. It may adjourn from day to day until such trial is ended, and may also continue the trial, before its commencement, for any time not exceeding twenty days, for good cause shown by either party upon affidavit, at the costs of the party applying for such continuance. En. March 11, 1872.

Cal. Rep. Cit. 119, 614; 119, 617.

§ 1122. Rules to govern court in trial of contest. The court must be governed, in the trial and determination of such contested election, by the rules of law and evidence

governing the determination of questions of law and fact, so far as the same may be applicable; and may dismiss the proceedings if the statement of the cause or causes of the contest is [in]sufficient, or for want of prosecution. After hearing the proofs and allegations of the parties, the court must pronounce judgment in the premises, either confirming or annulling and setting aside such election. En. March 11, 1872.

Cal. Rep. Cit. 65, 286; 121, 479; 141, 563; 142, 373.

§ 1123. Court may declare who was elected. If in any such case it appears that another person than the one returned has the highest number of legal votes, the court must declare such person elected. En. March 11, 1872.

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Cal. Rep. Cit. 128, 284; 140, 651; 141, 416; 141, 561; 141, 563.

§ 1124. Fees of officers and witnesses. (Repealed.) En. March 11, 1872. Rep. 1880, 76.

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§ 1125. Costs. If the proceedings are dismissed for insufficiency, or want of prosecution, or the election is by the court confirmed, judgment must be rendered against the party contesting such election, for costs, in favor of the party whose election was contested; but if the election is annulled and set aside, judgment for costs must be rendered against the party whose election was contested, in favor of the party contesting the same. Primarily, each party is liable for the costs created by himself, to the officers and witnesses entitled thereto, which may be collected in the same manner as similar costs are collected in other cases. En. March 11, 1872. Am'd. 1880, 75.

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Cal. Rep. Cit. 65, 286; 127, 33; 143, 549.

Costs, in special proceedings: Ante, secs. 1022, subd. 4, 1024; generally: Ante, secs. 1021 et seq.

§ 1126. Appeal. Either party, aggrieved by the judgment of the court, may appeal therefrom to the supreme court, as in other cases of appeal thereto from the superior court. En. March 11, 1872. Am'd. 1880, 75.

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Cal. Rep. Cit. 79, 483; 114, 98; 125, 528; 146, 325.

Appeals to supreme court: Ante, sec. 963; appeals, generally: Ante, secs. 936 et seq.

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§ 1127. When election void and office vacant. Whenever an election is annulled or set aside by the judgment of the superior court, and no appeal has been taken within ten days thereafter, the commission, if any has issued, is void, and the office vacant. En. March 11, 1872. Am'd. 1880, 76.

Cal. Rep. Cit. 111, 420; 114, 96; 129, 327; 134, 152. Subd. 1—111, 420.

TITLE III.

OF SUMMARY PROCEEDINGS.

- Chapter I. Confession of Judgment Without Action,
§§ 1132-1135.
- II. Submitting of a Controversy Without Action,
§§ 1138-1140.
- III. Discharge of Persons Imprisoned on Civil Process, §§ 1143-1154.
- IV. Summary Proceedings for Obtaining Possession of Real Property in Certain Cases,
§§ 1159-1179.

CHAPTER I.

CONFESSION OF JUDGMENT WITHOUT ACTION.

- § 1132. Judgment may be confessed for debt due or contingent liability.
- § 1133. Statement in writing and form thereof.
- § 1134. Filing statement and entering judgment.
- § 1135. How, in justices' courts.

§ 1132. Judgment may be confessed for debt due or contingent liability. A judgment by confession may be entered without action, either for money due or to become due, or to secure any person against contingent liability on behalf of the defendant, or both, in the manner prescribed by this chapter. Such judgment may be entered in any court having jurisdiction for like amounts. En. March 11, 1872.

Cal. Rep. Cit. 134, 672.

Prac. Act, sec. 374. En. April 29, 1851.

Cal. Rep. Cit. 18, 581.

Judgment by confession, in justice's court: Secs. 112, subd. 6, 114, 889, ante, 1135, post.

§ 1133. Statement in writing and form thereof. A statement in writing must be made, signed by the defendant, and verified by his oath, to the following effect:

1. It must authorize the entry of judgment for a specified sum;

2. If it be for money due, or to become due, it must state concisely the facts out of which it arose, and show that the sum confessed therefor is justly due, or to become due;

3. If it be for the purpose of securing the plaintiff against a contingent liability, it must state concisely the facts constituting the liability, and show that the sum confessed therefor does not exceed the same. En. March 11, 1872.

Prac. Act, sec. 375. En. April 29, 1851.

Cal. Rep. Cit. 18, 581.

§ 1134. Filing statement and entering judgment. The statement must be filed with the clerk of the court in which the judgment is to be entered, who must indorse upon it, and enter in the judgment book, a judgment of such court for the amount confessed, with ten dollars costs. The statement and affidavit, with the judgment indorsed, thereupon becomes the judgment-roll. En. March 11, 1872.

Prac. Act, sec. 376. En. April 29, 1851.

Cal. Rep. Cit. 18, 581.

§ 1135. How, in justice's courts. In a justice's court, where the court has authority to enter the judgment, the statement may be filed with the justice, who may thereupon enter in his docket a judgment of his court for the amount confessed, with three dollars costs. If a transcript of such judgment be filed with the county clerk, a copy of the statement must be filed with it. En. March 11, 1872.

Justice's court: Ante, secs. 112, subd. 6, 114, 889.

CHAPTER II.

SUBMITTING A CONTROVERSY WITHOUT ACTION.

§ 1138. Controversy, how submitted without action.

§ 1139. Judgment on, as in other cases, but without costs prior to notice of trial.

§ 1140. Judgment may be enforced or appealed from as in an action.

§ 1138. Controversy, how submitted without action. Parties to a question in difference, which might be the subject of a civil action, may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any court which would have jurisdiction, if an action had been brought; but it must appear, by affidavit, that the controversy is real, and the proceeding in good faith, to determine the rights of the parties. The court must thereupon hear and determine the case, and render judgment thereon, as if an action were depending. En. March 11, 1872.

Cal. Rep. Cit. 68, 285; 72, 134; 72, 144; 77, 513; 88, 408; 95, 334; 99, 148; 99, 556; 102, 139; 104, 517; 107, 465; 109, 397; 109, 577; 111, 425; 111, 427; 116, 21; 118, 40; 121, 562; 131, 411; 135, 513; 136, 64; 139, 326; 145, 49; 146, 111; 146, 112; 146, 113; 146, 590.

Prac. Act, sec. 377. En. April 29, 1851.

Cal. Rep. Cit. 20, 73; 20, 680.

§ 1139. Judgment on, as in other cases, but without costs prior to notice of trial. Judgment must be entered in the judgment book as in other cases, but without costs for any proceeding prior to the trial. The case, the submission, and a copy of the judgment, constitute the judgment-roll. En. March 11, 1872.

Cal. Rep. Cit. 135, 513.

Prac. Act, sec. 378. En. April 29, 1851.

Judgment-roll: Ante, sec. 670.

§ 1140. Judgment may be enforced or appealed from as in an action. The judgment may be enforced in the same manner as if it had been rendered in an action, and is in the same manner subject to appeal. En. March 11, 1872.

Cal. Rep. Cit. 68, 285; 88, 408; 135, 513.

Prac. Act, sec. 379. En. April 29, 1851.

Enforcement of judgment: Ante, sec. 684.

Appeals: Ante, secs. 936 et seq.

CHAPTER III.

DISCHARGE OF PERSONS IMPRISONED ON CIVIL PROCESS.

- § 1143. Persons confined may be discharged.
- § 1144. Notice of application.
- § 1145. Service of notice.
- § 1146. Examination before judge.
- § 1147. Interrogatories may be in writing.
- § 1148. Oath to be administered.
- § 1149. Order of discharge.
- § 1150. If not discharged, prisoner may again apply, when.
- § 1151. Discharge final.
- § 1152. Judgment remains in force.
- § 1153. Plaintiff may order discharge of the prisoner, who shall not thereafter be liable to imprisonment for the same cause of action.
- § 1154. Plaintiff to advance funds for support of prisoner.

§ 1143. Persons confined may be discharged. Any person confined in jail on an execution issued on a judgment rendered in a civil action, must be discharged therefrom upon the conditions in this chapter specified. En. March 11, 1872.

Cal. Rep. Cit. 75, 581; 75, 582; 79, 216.

§ 1144. Notice of application. Such person must cause a notice in writing to be given to the plaintiff, his agent, or attorney, that at a certain time and place he will apply to a judge of the superior court of the county in which such person may be confined for the purpose of obtaining a discharge from his imprisonment. En. March 11, 1872. Am'd. 1880, 114.

Notices: Ante, secs. 1010 et seq.

§ 1145. Service of notice. Such notice must be served upon the plaintiff, his agent or attorney, one day at least before the hearing of the application. En. March 11, 1872.

Service of notice: Ante, sec. 1015.

§ 1146. Examination before judge. At the time and place specified in the notice, such person must be taken before such judge, who must examine him under oath con-

cerning his estate and property and effects, and the disposal thereof, and his ability to pay the judgment for which he is committed; and such judge may also hear any other legal and pertinent evidence that may be produced by the debtor or the creditor. En. March 11, 1872.

§ 1147. **Interrogatories may be in writing.** The plaintiff in the action may, upon such examination, propose to the prisoner any interrogatories pertinent to the inquiry, and they must, if required by him, be proposed and answered in writing, and the answer must be signed and sworn to by the prisoner. En. March 11, 1872.

§ 1148. **Oath to be administered.** If, upon the examination, the judge is satisfied that the prisoner is entitled to his discharge, he must administer to him the following oath, to wit: "I, — —, do solemnly swear that I have not any estate, real or personal, to the amount of fifty dollars, except such as is by law exempted from being taken in execution; and that I have not any other estate now conveyed or concealed, or in any way disposed of, with design to secure the same to my use, or to hinder, delay, or defraud my creditors, so help me God." En. March 11, 1872.

Cal. Rep. Cit. 96, 234.

§ 1149. **Order of discharge.** After administering the oath, the judge must issue an order that the prisoner be discharged from custody, and the officer, upon the service of such order, must discharge the prisoner forthwith, if he be imprisoned for no other cause. En. March 11, 1872.

§ 1150. **If not discharged, prisoner may again apply, when.** If such judge does not discharge the prisoner, he may apply for his discharge at the end of every succeeding ten days, in the same manner as above provided, and the same proceedings must thereupon be had. En. March 11, 1872.

§ 1151. **Discharge final.** The prisoner, after being so discharged, is forever exempted from arrest or imprisonment for the same debt, unless he be convicted of having willfully sworn falsely upon his examination before the

judge, or in taking the oath before prescribed. En. March 11, 1872.

Cal. Rep. Cit. 96, 234.

§ 1152. Judgment remains in force. The judgment against any prisoner who is discharged remains in full force against any estate which may then or at any time afterward belong to him, and the plaintiff may take out a new execution against the goods and estate of the prisoner, in like manner as if he had never been committed. En. March 11, 1872.

§ 1153. Plaintiff may order discharge of the prisoner, who shall not thereafter be liable to imprisonment for the same cause of action. The plaintiff in the action may at any time order the prisoner to be discharged, and he is not thereafter liable to imprisonment for the same cause of action. En. March 11, 1872.

§ 1154. Plaintiff to advance funds for support of prisoner. Whenever a person is committed to jail on an execution issued on a judgment recovered in a civil action, the creditor, his agent or attorney, must advance to the jailer, on such commitment, sufficient money for the support of the prisoner for one week, and must make the like advance for every successive week of his imprisonment; and in case of failure to do so, the jailer must forthwith discharge such prisoner from custody, and such discharge has the same effect as if made by order of the creditor. En. March 11, 1872.

Cal. Rep. Cit. 50, 307.

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CHAPTER IV.

SUMMARY PROCEEDINGS FOR OBTAINING POSSESSION OF
REAL PROPERTY IN CERTAIN CASES.

- 1159. Forcible entry defined.
- 1160. Forcible detainer defined.
- 1161. Unlawful detainer defined.
- 1162. Service of notice.
- 1163. Jurisdiction of superior courts.
- 1164. Parties defendant.
- 1165. Parties generally.
- 1166. Complaint. When summons must be issued.
- 1167. Summons, form and service of.
- 1168. Arrest.
- 1169. Judgment by default.
- 1170. Defendant may appear, etc.
- 1171. Trial by jury.
- 1172. Showing required of plaintiff in forcible entry or detainer. Of defendant.
- 1173. Complaint must be amended in certain cases.
- 1174. Verdict and judgment.
- 1175. Verification of complaint and answer.
- 1176. Effect of an appeal upon the judgment.
- 1177. Rules of practice.
- 1178. Appeals, how taken, etc.
- 1179. Relief against forfeiture of lease.

§ 1159. Forcible entry defined. Every person is guilty of a forcible entry who either:

1. By breaking open doors, windows, or other parts of a house, or by any kind of violence or circumstance of terror, enters upon or into any real property; or,
2. Who, after entering peaceably upon real property, turns out by force, threats or menacing conduct, the party in possession. En. March 11, 1872.

Cal. Rep. Cit. 49, 273; 53, 674; 60, 574; 62, 68; 69, 563;
71, 133; 76, 133; 83, 100; 107, 301; 135, 661; 138, 420.

Proof required: Post, sec. 1172.

Parties defendant: Post, secs. 1164, 1165.

§ 1160. Forcible detainer defined. Every person is guilty of a forcible detainer who either:

1. By force, or by menaces and threats of violence, unlawfully holds and keeps the possession of any real property, whether the same was acquired peaceably or otherwise; or,
2. Who, in the night-time, or during the absence of the

occupant of any lands, unlawfully enters upon real property, and who, after demand made for the surrender thereof, for the period of five days refuses to surrender the same to such former occupant.

The occupant of real property, within the meaning of this subdivision, is one who within five days preceding such unlawful entry, was in the peaceable and undisturbed possession of such lands. En. March 11, 1872.

Cal. Rep. Cit. 50, 317; 51, 543; 53, 674; 60, 574; 76, 627; 77, 256; 83, 97; 107, 301; 137, 605; 138, 420. Subd. 2—51, 533; 76, 133; 83, 100; 114, 346; 114, 347.

§ 1161. Unlawful detainer defined. A tenant of real property, for a term of less than life, is guilty of unlawful detainer:

1. When he continues in possession, in person or by subtenant, of the property, or any part thereof, after the expiration of the term for which it is let to him, without the permission of his landlord, or the successor in estate of his landlord, if any there be; but in case of a tenancy at will it must first be terminated by notice, as prescribed in the Civil Code.

2. When he continues in possession, in person or by subtenant, without the permission of his landlord, or the successor in estate of his landlord, if any there be, after default in the payment of rent, pursuant to the lease or agreement under which the property is held, and three days' notice, in writing, requiring its payment stating the amount which is due, or possession of the property, shall have been served upon him and if there is a subtenant in actual occupation of the premises, also upon such subtenant.

Such notice may be served at any time within one year after the rent becomes due. In all cases of tenancy upon agricultural lands, where the tenant has held over and retained possession for more than sixty days after the expiration of the term without any demand of possession or notice to quit by the landlord, or the successor in estate of his landlord, if any there be, he shall be deemed to be holding by permission of the landlord, or the successor in estate of his landlord, if any there be, and shall be en-

titled to hold under the terms of the lease for another full year, and shall not be guilty of an unlawful detainer during said year, and such holding over for the period aforesaid shall be taken and construed as a consent on the part of a tenant to hold for another year.

3. When he continues in possession, in person or by subtenant, after a neglect or failure to perform other conditions or covenants of the lease or agreement under which the property is held, including any covenant not to assign or sublet, than the one for the payment of rent, and three days' notice, in writing, requiring the performance of such conditions or covenants, or the possession of the property, shall have been served upon him, and if there is a subtenant in actual occupation of the premises, also, upon such subtenant. Within three days after the service of the notice, the tenant, or any subtenant in actual occupation of the premises, or any mortgagee of the term, or other person interested in its continuance, may perform the conditions or covenants of the lease or pay the stipulated rent, as the case may be, and thereby save the lease from forfeiture; provided, if the conditions and covenants of the lease, violated by the lessee, cannot afterward be performed, then no notice, as last prescribed herein, need be given to said lessee or his subtenant, demanding the performance of the violated conditions or covenant of the lease.

A tenant may take proceedings, similar to those prescribed in this chapter, to obtain possession of the premises let to a subtenant, in case of his unlawful detention of the premises underlet to him.

4. Any tenant or subtenant assigning or subletting or committing waste upon the demised premises, contrary to the conditions or covenants of his lease, thereby terminates the lease, and the landlord, or his successor in estate, shall upon service of three days' notice to quit upon the person or persons in possession, be entitled to restitution of possession of such demised premises under the provisions of this chapter. *En. March 11, 1872. Am'd. 1873-4, 346; 1875-6, 101; 1877-8, 104; 1877-8, 106. Rep. 1905, 29. En. 1905, 29.*

Cal. Rep. Cit. 52, 472; 56, 130; 63, 49; 63, 52; 63, 69; 66, 446; 66, 447; 68, 506; 71, 536; 79, 442; 84, 422;

§ 1162. **Service of notice.** The notices required by the preceding section may be served either:

91, 597; 98, 425; 132, 135; 137, 605; 138, 78; 138, 284.
Subd. 1—79, 442; 106, 221. Subd. 2—60, 374; 107, 112;
141, 556; 145, 557. Subd. 3—63, 69; 139, 659; 139, 660.

1. By delivering a copy to the tenant personally; or,

2. If he be absent from his place of residence, and from his usual place of business, by leaving a copy with some person of suitable age and discretion at either place, and sending a copy through the mail addressed to the tenant at his place of residence; or,

3. If such place of residence and business cannot be ascertained, or a person of suitable age or discretion there cannot be found, then by affixing a copy in a conspicuous place on the property, and also delivering a copy to a person there residing, if such person can be found; and also sending a copy through the mail addressed to the tenant at the place where the property is situated. Service upon a subtenant may be made in the same manner. En. March 11, 1872. Am'd. 1873-4, 347.

Cal. Rep. Cit. 56, 129; 63, 52; 63, 611; 66, 447; 70, 446;
105, 19; 125, 617.

§ 1163. **Jurisdiction of superior courts.** The superior court of the county in which the property, or some part of it, is situated, shall have jurisdiction of proceedings under this chapter; provided, that justices' courts, within their respective townships, or cities, or cities and counties shall have concurrent jurisdiction with the superior courts in cases of forcible entry and detainer, when the rental value does not exceed twenty-five dollars per month, and when the whole amount of damages claimed does not exceed two hundred dollars. En. March 11, 1872. Am'd. 1880, 8.

Cal. Rep. Cit. 130, 98; 130, 99.

Concurrent jurisdiction of justices' court: Ante, sec. 113, subd. 1.

§ 1164. **Parties defendant.** No person other than the tenant of the premises and subtenant, if there be one, in the actual occupation of the premises when the complaint

is filed, need be made parties defendant in the proceeding, nor shall any proceeding abate, nor the plaintiff be non-suited for the nonjoinder of any person who might have been made party defendant, but when it appears that any of the parties served with process, or appearing in the proceeding, are guilty of the offense charged, judgment must be rendered against him. In case a defendant has become a subtenant of the premises in controversy, after the service of the notice provided for by part two of section eleven hundred and sixty-one of this code, upon the tenant of the premises, the fact that such notice was not served on each subtenant shall constitute no defense to the action. In case a married woman be a tenant, or a subtenant, her coverture shall constitute no defense; but in case her husband be not joined, or unless she be doing business as a sole trader, an execution issued upon a personal judgment against her can only be enforced against property on the premises at the commencement of the action. All persons who enter the premises under the tenant, after the commencement of the suit, shall be bound by the judgment, the same as if he or they had been made party to the action. En. March 11, 1872. Am'd. 1873-4, 348; 1885, 129.

Cal. Rep. Cit. 122, 437.

Parties plaintiff, and generally: Post, sec. 1165.

§ 1165. Parties generally. Except as provided in the preceding section the provisions of part two of this code, relating to parties to civil actions, are applicable to this proceeding. En. March 11, 1872.

See secs. 367 et seq., ante.

Parties defendant: Sec. 1164.

§ 1166. Complaint. When summons must be issued. The plaintiff, in his complaint, which shall be in writing, must set forth the facts on which he seeks to recover, and describe the premises with reasonable certainty, and may set forth therein any circumstances of fraud, force, or violence which may have accompanied the alleged forcible entry or forcible or unlawful detainer and claim damages therefor. In case the unlawful detainer charged be after default in the payment of rent, the complaint must state the amount of such rent. Upon filing the complaint, a summons must be issued thereon as in other cases, returnable at a day

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designated therein, which shall not be less than three days, nor more than twelve days from its date, except in cases when the publication of the summons is necessary, in which case the court or a judge or justice thereof, may order that the summons be made returnable at such time, as may be deemed proper, and the summons shall specify the return day so fixed. En. March 11, 1872. Am'd. 1873-4, 348; 1877-8, 107; 1880, 8.

Complaint, generally: Sec. 426, ante.

Damages: Sec. 1174.

Amendment: Ante, secs. 472, 473.

Verification: Secs. 446, ante, 1175, post.

Parties: Ante, secs. 1164, 1165.

§ 1167. **Summons, form and service of.** The summons must state the parties to the proceeding, the court in which the same is brought, the nature of the action, in concise terms, and the relief sought, and also the return day, and must notify the defendant to appear and answer within the time designated, or that the relief sought will be taken against him. The summons must be directed to the defendant, and be served at least two days before the return day designated therein, and must be served and returned in the same manner as summons in civil actions is served and returned; provided, that if it appears to the court the defendant is concealing himself to avoid the service of summons and the defendant cannot be found at his place of residence or business, or if his place of residence or business cannot be ascertained, the court may order the summons to be served by affixing a copy thereof in a conspicuous place on the property involved in the action, and also delivering a copy to a person there residing, if such person can be found, and also sending a copy thereof through the mail addressed to the defendant at the place where the property is situated. Upon the return of any summons issued under this chapter, where the same has not, for any reason, been served, or not served in time, the plaintiff may have a new summons issued, the same as if no previous summons had been issued. En. March 11, 1872. Am'd. 1873-4, 349; 1880, 8; 1905, 423.

Cal. Rep. Cit. 49, 273.

Service of summons, in civil action: Secs. 406 et seq.

§ 1168. Arrest. If the complaint presented establishes, to the satisfaction of the judge or justice, fraud, force, or violence, in the entry or detainer, and that the possession held is unlawful, he may make an order for the arrest of the defendant. En. March 11, 1872. Am'd. 1880, 9.

Cal. Rep. Cit. 92, 371.

Arrest, generally: Ante, secs. 478 et seq.

§ 1169. Judgment by default. If, at the time appointed, the defendant do not appear and defend, the court must enter his default, and render judgment in favor of the plaintiff, as prayed for in the complaint. En. March 11, 1872.

Judgment by default, generally: Ante, sec. 585.

§ 1170. Defendant may appear, etc. On or before the day fixed for his appearance, the defendant may appear and answer or demur. En. March 11, 1872.

Appearance, generally: Ante, sec. 1014.

Answer—Scope of: Post, sec. 1172; verification: Post, sec. 1175; generally: Ante, sec. 437.

§ 1171. Trial by jury. Whenever an issue of fact is presented by the pleadings, it must be tried by a jury, unless such jury be waived as in other cases. The jury shall be formed in the same manner as other trial juries in the court in which the action is pending. En. March 11, 1872. Am'd. 1873-4, 349; 1880, 9.

Trial by jury: Ante, secs. 600-628; issue of fact: Ante, secs. 590 et seq.; waiver: Ante, sec. 631. Formation of the jury: Ante, secs. 600-604.

Justices' courts—Trials in: Ante, secs. 878-887.

§ 1172. Showing required of plaintiff in forcible entry or detainer. Of defendant. On the trial of any proceeding for any forcible entry or forcible detainer, the plaintiff shall only be required to show, in addition to the forcible entry or forcible detainer complained of, that he was peace-

ably in the actual possession at the time of the forcible entry, or was entitled to the possession at the time of the forcible detainer. The defendant may show in his defense, that he or his ancestors, or those whose interest in such premises he claims, have been in the quiet possession thereof for the space of one whole year together next before the commencement of the proceedings, and that his interest therein is not then ended or determined; and such showing is a bar to the proceedings. En. March 11, 1872.

Cal. Rep. Cit. 60, 573; 60, 574; 67, 452; 69, 563; 77, 256; 107, 302; 114, 348; 114, 349; 125, 265; 138, 421.

Practice: See post, sec. 1177.

§ 1173. Complaint must be amended in certain cases. When, upon the trial of any proceeding under this chapter, it appears from the evidence that the defendant has been guilty of either a forcible entry, or a forcible or unlawful detainer, and other than the offense charged in the complaint, the judge must order that such complaint be forthwith amended to conform to such proofs; such amendment must be made without any imposition of terms. No continuance shall be permitted upon account of such amendment, unless the defendant, by affidavit filed, shows to the satisfaction of the court good cause therefor. En. March 11, 1872. Am'd. 1885, 102.

Cal. Rep. Cit. 125, 566.

Continuance, generally: Ante, sec. 595.

§ 1174
Am'd.
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§ 1174. Verdict and judgment. If, upon the trial, the verdict of the jury, or, if the case be tried without a jury, the finding of the court be in favor of the plaintiff and against the defendant, judgment shall be entered for the restitution of the premises; and if the proceeding be for an unlawful detainer after neglect, or failure to perform the conditions or covenants of the lease or agreement under which the property is held, or after default in the payment of rent, the judgment shall also declare the forfeiture of such lease or agreement. The jury, or the court, if the proceeding be tried without a jury, shall also assess the damages occasioned to the plaintiff by any forcible entry, or by any forcible or unlawful detainer,

alleged in the complaint and proved on the trial, and find the amount of any rent due, if the alleged unlawful detainer be after default in the payment of rent, and the judgment shall be rendered against the defendant guilty of the forcible entry, or forcible or unlawful detainer, for three times the amount of the damages thus assessed, and of the rent found due. When the proceeding is for an unlawful detainer after default in the payment of rent, and the lease or agreement under which the rent is payable has not by its terms expired, execution upon the judgment shall not be issued until the expiration of five days after the entry of the judgment, within which time the tenant, or any subtenant, or any mortgagee of the term, or other party interested in its continuance, may pay into court, for the landlord, the amount found due as rent, with interest thereon, and the amount of the damages found by the jury or the court for the unlawful detainer, and the costs of the proceeding, and thereupon the judgment shall be satisfied and the tenant be restored to his estate; but if payment, as here provided, be not made within the five days, the judgment may be enforced for its full amount, and for the possession of the premises. In all other cases the judgment may be enforced immediately. En. March 11, 1872. Am'd. 1873-4, 349.

Cal. Rep. Cit. 57, 192; 90, 501; 91, 598; 125, 566; 138, 283; 139, 142; 139, 143; 141, 623.

Treble damages: See ante, sec. 735; Civ. Code, sec. 3345.

Forfeiture, relief from: Post, sec. 1179.

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Repl'd.
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§ 1175. Verification of complaint and answer. The complaint and answer must be verified. En. March 11, 1872.

Cal. Rep. Cit. 59, 481; 60, 375.

§ 1176. Effect of an appeal upon the judgment. An appeal taken by the defendant shall not stay proceedings upon the judgment, unless the judge or justice before whom the same was rendered so directs. En. March 11, 1872. Am'd. 1880, 9.

Cal. Rep. Cit. 71, 536; 73, 641; 81, 227; 135, 661; 135, 662; 139, 141; 139, 143.

Appeal as stay—Generally: Ante, secs. 946, 949.

§ 1177. Rules of practice. Except as otherwise provided in this chapter, the provisions of part two, of this code, are applicable to, and constitute the rules of practice in the proceedings mentioned in this chapter. En. March 11, 1872.

Cal. Rep. Cit. 91, 598.

For part two: See ante, secs. 307 et seq.

§ 1178. Appeals, how taken, etc. Provisions of part two of this code, relative to new trials and appeals, except in so far as they are inconsistent with the provisions of this chapter, apply to the proceedings mentioned in this chapter. En. March 11, 1872.

See ante, secs. 656 et seq., 936 et seq.

§ 1179. Relief against forfeiture of lease. The court may relieve a tenant against a forfeiture of a lease, and restore him to his former estate, in case of hardship, where application for such relief is made within thirty days after the forfeiture is declared by the judgment of the court, as provided in section one thousand one hundred and seventy-four. The application may be made by a tenant or subtenant, or a mortgagee of the term, or any person interested in the continuance of the term. It must be made upon petition, setting forth the facts upon which the relief is sought, and be verified by the applicant. Notice of the application, with a copy of the petition, must be served on the plaintiff in the judgment, who may appear and contest the application. In no case shall the application be granted except on condition that full payment of rent due, or full performance of conditions or covenants stipulated, so far as the same is practicable, be made. En. Stats. 1873-4, 350. Am'd. 1880, 9.

Cal. Rep. Cit. 139, 663.

TITLE IV.

OF THE ENFORCEMENT OF LIENS.

Chapter I. Liens in General, § 1180.

II. Liens of Mechanics and Others Upon Real Property, §§ 1183-1203.

III. Certain Liens for Salaries and Wages, §§ 1204-1207.

CHAPTER I.

LIENS IN GENERAL.

§ 1180. Definition of lien.

§ 1180. Definition of lien. A lien is a charge imposed upon specific property by which it is made security for the performance of an act. En. March 11, 1872.

Cal. Rep. Cit. 71, 73; 115, 179; 134, 131.

Lien, definition of: Civ. Code, sec. 2872.

Priority of liens: Civ. Code, sec. 2897.

CHAPTER II.

LIENS OF MECHANICS AND OTHERS UPON REAL PROPERTY.

- § 1183. Mechanics' liens upon what.
- § 1183½. Building contracts, what provisions to contain. (Repealed.)
- § 1184. Contract price payable in installments.
- § 1185. What interest in the land subject to the lien.
- § 1186. Effect of liens.
- § 1187. Claim of lien to be filed in recorder's office.
- § 1188. Liens upon two or more pieces of property. Amount due from each to be designated.
- § 1189. Claim to be recorded. Fees of recorder.
- § 1190. Time of continuance of lien.
- § 1191. Lien upon lot for improving.
- § 1192. At instance of owner, what held to be constructed.
- § 1193. Contractor; liens for claims against.
- § 1194. Court to declare rank of liens. Deficiency to be docketed.
- § 1195. Any number of lienholders may join in action.
- § 1196. Attachment, etc., against materials.
- § 1197. Lien does not impair right to proceed for recovery of the debt.
- § 1198. Rules of practice.
- § 1199. New trials and appeals.
- § 1200. Where contractor fails to perform contract.
- § 1201. Written consent to waive claims.
- § 1202. What forfeits liens.
- § 1203. Bond of contractor to be filed.

Gen. Cit. to Chap.—Cal. Rep. Cit. 54, 220; 87, 591; 68, 266.

§ 1183. Mechanics' lien upon what. Mechanics, materialmen, contractors, subcontractors, artisans, architects, machinists, builders, miners, and all persons and laborers of every class performing labor upon or furnishing materials to be used in the construction, alteration, addition to, or repair, either in whole or in part, of any building, wharf, bridge, ditch, flume, aqueduct, well, tunnel, fence, machinery, railroad, wagon road or other structure, shall have a lien upon the property upon which they have bestowed labor or furnished materials, for the value of such labor done and materials furnished, whether at the instance of the owner, or of any other person acting by his authority or under him, as contractor or otherwise; and any person who performs labor in any mining claim or claims, or in or upon any real property worked as a mine, either in the development thereof or in working thereon by the subtractive process, has a lien upon the same, and the works owned and used by the owners for reducing the ores from such mining claim or claims, or real property so worked as a mine, for the work or labor done or materials furnished by each respectively, whether done or furnished at the instance of

the owner of such mining claim or claims or real property worked as a mine or of the building, or other improvement, or his agent; and every contractor, subcontractor, architect, builder, or other person having charge of any mining, or work and labor performed in and about such mining claim or claims, or real property worked as a mine, or the construction, alteration, addition to, or repair, either in whole or in part of any building or other improvement as aforesaid, or of such mining claim or claims, either as lessee or under a working bond or contract thereon, with the privilege of purchase, or otherwise, shall be held to be the agent of the owner for the purposes of this chapter. In case of a contract for the work between the reputed owner and his contractor, the liens shall extend to the entire contract price, and such contract shall operate as a lien in favor of all persons, except the contractor, to the extent of the whole contract price, and after all such liens are satisfied, then as a lien for any balance of the contract price in favor of the contractor. All such contracts shall be in writing when the amount agreed to be paid thereunder exceeds one thousand dollars, and shall be subscribed by the parties thereto; and the said contract, or a memorandum thereof, setting forth the names of all the parties to the contract, a description of the property to be affected thereby, together with a statement of the general character of the work to be done, the total amount to be paid thereunder, and the amounts of all partial payments, together with the times when such payments shall be due and payable, shall, before the work is commenced, be filed in the office of the county recorder of the county, or city and county, where the property is situated, who shall receive one dollar for such filing; otherwise, they shall be wholly void, and no recovery shall be had thereon by either party thereto; and in such case, the labor done and materials furnished by all persons aforesaid, except the contractor, shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof. En. March 11, 1872. Am'd. 1873-4, 409; 1880, 63; 1885, 143; 1887, 152; 1899, 33; 1903, 84.

Cal. Rep. Cit. 54, 336; 55, 163; 55, 392; 56, 309; 61, 353; 61, 354; 66, 196; 66, 197; 66, 292; 70, 126; 70, 189; 70, 220; 70, 221; 74, 626; 74, 627; 75, 212; 76, 436; 78, 196; 78, 197; 78, 201; 80, 278; 80, 512; 81, 171; 81, 173; 81, 175; 81, 643; 81, 644; 81, 645; 82, 43;

82, 44; 82, 45; 82, 149; 82, 150; 83, 372; 86, 24; 86, 26; 87, 593; 88, 22; 88, 42; 89, 112; 90, 578; 90, 599; 90, 601; 90, 602; 91, 138; 91, 139; 91, 236; 91, 237; 91, 561; 92, 237; 94, 207; 94, 208; 94, 234; 94, 236; 94, 560; 95, 393; 95, 394; 95, 395; 96, 257; 96, 442; 97, 11; 97, 188; 97, 257; 97, 266; 97, 645; 97, 646; 98, 152; 98, 154; 99, 319; 99, 453; 99, 454; 102, 140; 102, 142; 104, 31; 104, 507; 107, 60; 107, 64; 107, 623; 109, 397; 109, 549; 110, 168; 110, 510; 111, 293; 112, 291; 113, 123; 114, 492; 115, 343; 115, 661; 117, 214; 117, 472; 117, 671; 117, 699; 118, 154; 120, 95; 120, 96; 120, 184; 120, 285; 120, 456; 120, 457; 121, 155; 122, 81; 123, 533; 124, 28; 126, 13; 126, 14; 126, 567; 127, 10; 127, 25; 127, 41; 127, 43; 127, 44; 127, 328; 128, 147; 128, 330; 128, 366; 129, 65; 129, 394; 129, 395; 131, 144; 132, 495; 133, 118; 133, 172; 133, 173; 133, 177; 133, 286; 133, 288; 136, 125; 138, 333; 138, 430; 138, 614; 138, 616; 139, 380; 140, 504; 141, 32; 142, 242; 144, 99; 144, 102; 146, 688; 147, 492.

§ 1183½. Building contracts, what provisions must contain. (Repealed.) En. 1900-01, 817. Rep. 1903, 21.

Cal. Rep. Cit. 142, 203.

§ 1184. Contract price payable in installments. No part of the contract price shall, by the terms of any such contract, be made payable, nor shall the same or any part thereof be paid in advance of the commencement of the work, but the contract price shall, by the terms of the contract, be made payable in installments at specified times after the commencement of the work, or on the completion of specified portions of the work, or on the completion of the whole work; provided, that at least twenty-five per cent of the whole contract price shall be made payable at least thirty-five days after the final completion of the contract. No payment made prior to the time when the same is due, under the terms and conditions of the contract, shall be valid for the purpose of defeating, diminishing, or discharging any lien in favor of any person, except the contractor, but as to such liens, such payment shall be deemed as if not made, and shall be applicable to such liens, notwithstanding that the contractor to whom it was paid may thereafter abandon his contract, or be or become indebted to the reputed owner in any amount for damages or otherwise, for nonperformance of his contract

or otherwise. As to all liens, except that of the contractor, the whole contract price shall be payable in money, and shall not be diminished by any prior or subsequent indebtedness, offset, or counterclaim, in favor of the reputed owner and against the contractor; no alteration of any such contract shall affect any lien acquired under the provisions of this chapter. In case such contracts and alterations thereof do not conform substantially to the provisions of this section, the labor done and materials furnished by all persons except the contractor shall be deemed to have been done and furnished at the personal instance and request of the person who contracted with the contractor, and they shall have a lien for the value thereof. Any of the persons mentioned in section eleven hundred and eighty-three, except the contractor, may at any time give to the reputed owner a written notice that they have performed labor or furnished materials, or both, to the contractor, or other person acting by authority of the reputed owner, or that they have agreed to do so, stating in general terms the kind of labor and materials, and the name of the person to or for whom the same was done or furnished, or both, and the amount in value, as near as may be, of that already done or furnished, or both, and of the whole agreed to be done or furnished, or both. Such notice may be given by delivering the same to the reputed owner personally, or by leaving it at his residence or place of business, with some person in charge, or by delivering it to his architects, or by leaving it at their residence or place of business, with some person in charge, or by posting it in a conspicuous place upon the mining claim or improvement. No such notice shall be invalid by reason of any defect of form, provided it is sufficient to inform the reputed owner of the substantial matters herein provided for, or to put him upon inquiry as to such matters. Upon such notice being given, it shall be the duty of the person who contracted with the contractor to, and he shall, withhold from his contractor, or from any other person acting under such reputed owner, and to whom by said notice the said labor or materials, or both, have been furnished, or agreed to be furnished, sufficient money due, or that may become due to such contractor, or other person, to answer such claim and any lien that may be filed therefor for record under this chapter, including counsel fees not exceeding one hundred dollars in each case, besides reasonable costs provided for in this chapter. En. March 11, 1872. Am'd. 1885, 144; 1887, 153.

Cal. Rep. Cit. 61, 353; 81, 174; 81, 643; 81, 644; 82, 44; 82, 149; 86, 24; 86, 25; 86, 26; 87, 593; 87, 594; 90, 546; 90, 547; 90, 548; 90, 578; 90, 600; 91, 139; 91, 140; 91, 365; 91, 561; 92, 237; 94, 234; 94, 560; 94, 561; 97, 188; 97, 645; 99, 635; 104, 225; 107, 60; 107, 65; 109, 551; 111, 667; 112, 291; 119, 182; 122, 81; 124, 27; 124, 513; 125, 226; 125, 589; 126, 14; 129, 413; 130, 238; 130, 239; 130, 242; 131, 136; 132, 495; 133, 117; 133, 243; 133, 244; 135, 640; 135, 642; 136, 124; 136, 126; 138, 427; 138, 429; 138, 430; 138, 628; 139, 382; 146, 269; 146, 270; 146, 271; 146, 273; 146, 276.

§ 1185. What interest in the land subject to the lien. The land upon which any building, improvement, well, or structure is constructed, together with a convenient space about the same, or much as may be required for the convenient use and occupation thereof, to be determined by the court on rendering judgment is also subject to the lien, if at the commencement of the work, or the furnishing of the materials for the same, the land belonged to the person who caused said building, improvement, well, or structure to be constructed, altered, or repaired, but if such person owned less than a fee simple estate in such land, then only his interest therein is subject to such lien. En. March 11, 1872. Am'd. 1873-4, 351; 1899, 24.

Cal. Rep. Cit. 54, 627; 61, 353; 66, 196; 66, 197; 66, 292; 70, 126; 74, 360; 80, 277; 80, 278; 80, 279; 87, 512; 94, 211; 98, 286; 109, 551; 120, 284; 120, 285; 126, 12; 146, 687; 146, 688; 147, 493; 147, 495.

§ 1186. Effect of liens. The liens provided for in this chapter are preferred to any lien, mortgage, or other encumbrance which may have attached subsequent to the time when the building, improvement, or structure was commenced, work done, or materials were commenced to be furnished; also, to any lien, mortgage or other encumbrance of which the lienholder had no notice, and which was unrecorded at the time the building, improvement or structure was commenced, work done, or the materials were commenced to be furnished. En. March 11, 1872.

Cal. Rep. Cit. 57, 49; 61, 354; 66, 199; 66, 200; 66, 201; 74, 360; 80, 67; 87, 627; 131, 144; 140, 505; 142, 243.

Parties to suit: Sec. 1190.

§ 1187. Claim of lien to be filed in recorder's office. The owner of any property on which labor has been

performed, or for which materials have been furnished to be used in the construction, alteration, addition to, or repair, either in whole or in part, of any work, mentioned in section eleven hundred and eighty-three of this code must, within ten days after the completion thereof, or within forty days after cessation from labor upon any unfinished contract, or upon any unfinished building, improvement, or structure, or the alteration, addition to, or the repair thereof, file for record in the office of the county recorder of the county, or city and county, in which such property or some part thereof is situated, a notice setting forth the date when such building, improvement, or structure, or the alteration, addition to, or repair thereof, was actually completed, or in case of cessation from labor for thirty days, the date on which such cessation actually occurred, and said notice shall also contain the name and the nature of the title of the person who caused the said building, improvement, or structure to be erected, or said alteration, addition to, or repair to be made, and also a description of the property sufficient for identification, and said notice must be verified by said owner or some other person in his behalf. In case any such owner neglect to file said notice as herein required, within the time herein required, then the said owner and all persons derailing title from him, and all persons claiming an interest in said property, shall be estopped in any proceedings brought to foreclose any mechanics' lien or liens, provided for in this chapter, from maintaining a defense therein based on the ground that said lien or liens have not been filed within the time provided in this chapter. Said notice, when so filed for record must be recorded by the county recorder with whom the same is filed for record, and the fee for recording the same shall be the sum of one dollar.

Every original contractor, at any time after the completion of his contract, and until the expiration of sixty days after the filing of said notice of completion or notice of cessation of labor by the owner, and every person save the original contractor claiming the benefit of this chapter at any time after the completion of any building, improvement, or structure, or of the alteration, addition to, or repair thereof, and until the expiration of thirty days after the filing of said notice of completion or cessation by said owner, or within thirty days after the performance of any labor in a mining claim, must file for record with the county recorder of the county, or city and county, in which such property or some part thereof is situated, a

claim containing a statement of his demand, after deducting all just credits and offsets, with the name of the owner or reputed owner, if known, and also the name of the person by whom he was employed, or to whom he furnished the materials, with a statement of the terms, time given, and conditions of his contract, and also a description of the property to be charged with the lien, sufficient for identification, which claim must be verified by the oath of himself or of some other person; provided, however, that in any event all claims of lien must be filed within ninety days after the completion of said building, improvement, or structure, or the alteration, addition to or repair thereof. Any trivial imperfection in the said work, or in the construction of any building, improvement, or structure, or of the alteration, addition to, or repair thereof, shall not be deemed such a lack of completion as to prevent the filing of any lien; and in all cases the occupation or use of a building, improvement, or structure, by the owner, or his representative, or the acceptance by said owner or his agent of said building, improvement, or structure, and cessation from labor for thirty days upon any contract or upon any building, improvement, or structure, or the alteration, addition to, or repair thereof, shall be deemed equivalent to a completion thereof for all the purposes of this chapter. En. March 11, 1872 Am'd. 1873-4, 410; 1887, 154; 1897, 202.

• Cal. Rep. Cit. 54, 221; 54, 222; 54, 642; 55, 391; 60, 441; 61, 353; 63, 104; 63, 430; 65, 341; 70, 126; 72, 79; 74, 277; 74, 278; 74, 279; 74, 433; 76, 510; 78, 195; 78, 196; 80, 276; 81, 646; 82, 146; 82, 150; 82, 151; 82, 658; 85, 83; 85, 85; 86, 342; 87, 512; 87, 629; 88, 22; 88, 23; 88, 150; 90, 545; 90, 594; 90, 595; 90, 597; 90, 601; 91, 140; 91, 365; 92, 237; 94, 208; 94, 237; 94, 238; 96, 334; 96, 337; 96, 338; 96, 386; 97, 257; 97, 265; 102, 140; 102, 325; 103, 106; 103, 107; 106, 232; 106, 235; 107, 65; 109, 180; 109, 550; 109, 551; 110, 165; 110, 167; 110, 168; 115, 3; 115, 662; 119, 379; 120, 139; 120, 183; 120, 184; 122, 104; 122, 105; 124, 26; 134, 513; 125, 226; 125, 283; 125, 284; 125, 373; 127, 44; 131, 160; 132, 494; 133, 119; 135, 639; 136, 91; 138, 614; 138, 616; 138, 617; 141, 33; 146, 332; 147, 494.

Verification of claim: Ante, sec. 446.

§ 1188. Liens upon two or more pieces of property. Amount due from each to be designated. In every case in which one claim is filed against two or more buildings, mining claims or other improvements owned by the same person, the person filing such claim must, at the same time, designate the amount due to him on each of such buildings, mining claims, or other improvements; otherwise the lien of such claim is postponed to other liens. The lien of such claimant does not extend beyond the amount designated, as against other creditors having liens by judgment, mortgage, or otherwise, upon either of such buildings or other improvements, or upon the land upon which the same are situated. En. March 11, 1872.

Cal. Rep. Cit. 55, 163; 55, 285: 61, 353; 72, 84; 88, 43; 102, 141; 110, 510.

§ 1189. Claim to be recorded. Fees of recorder. The recorder must record the claim in a book kept by him for that purpose, which record must be indexed as deeds and other conveyances are required by law to be indexed. and for which he may receive the same fees as are allowed by law for recording deeds and other instruments. En. March 11, 1872.

§ 1190. Time of continuance of lien. No lien provided for in this chapter binds any building, mining claim, improvement, or structure, for a longer period than ninety days after the same has been filed, unless proceedings be commenced in a proper court within that time to enforce the same; or, if a credit be given, then ninety days after the expiration of such credit; but no lien continues in force for a longer time than two years from the time the work is completed, by any agreement to give credit. En. March 11, 1872.

Cal. Rep. Cit. 63, 122; 74, 278; 74, 279; 82, 658; 107, 65.

Complaint, generally: Ante, sec. 426.

Personal action: Post, sec. 1197.

§ 1191. Lien upon lot for improving. Any person who, at the request of the reputed owner of any lot in any incorporated city or town, grades, fills in, or otherwise improves, the same, or the street or sidewalk in front of or adjoining the same, or constructs any areas, or vaults, or

cellars, or rooms, under said sidewalks, or makes any improvements in connection therewith, has a lien upon said lot for his work done and materials furnished. En. March 11, 1872. Am'd. 1885, 145; 1887, 155.

Cal. Rep. Cit. 72, 512; 80, 67; 96, 257; 110, 363; 110, 510; 117, 213; 117, 214; 119, 412; 126, 13; 131, 225; 133, 115; 133, 117; 133, 118; 138, 575; 145, 261; 145, 263; 145, 265.

§ 1192. At instance of owner, what held to be constructed. Every building or other improvement mentioned in section one thousand one hundred and eighty-three of this code, constructed upon any lands with the knowledge of the owner, or the person having or claiming any interest therein, shall be held to have been constructed at the instance of such owner or person having or claiming any interest therein, and the interest owned or claimed shall be subject to any lien filed in accordance with the provisions of this chapter, unless such owner or person having or claiming an interest therein shall, within three days after he shall have obtained knowledge of the construction, alteration, or repair, or the intended construction, alteration, or repair, give notice that he will not be responsible for the same, by posting a notice in writing to the effect, in some conspicuous place upon said land, or upon the building or other improvement situated thereon. En. March 11, 1872. Am'd. 1873-4, 410. §1192 Am'd. p. 481

Cal. Rep. Cit. 54, 336; 55, 163; 66, 200; 66, 201; 72, 512; 80, 277; 80, 278; 80, 279; 80, 280; 82, 145; 82, 146; 86, 340; 87, 513; 87, 627; 104, 34; 114, 492; 114, 493; 116, 335; 117, 214; 118, 152; 119, 379; 120, 139; 120, 284; 122, 518; 122, 520; 122, 522; 126, 567; 128, 366; 131, 162; 133, 117; 133, 118; 133, 288; 133, 289; 139, 498; 140, 504.

§ 1193. Contractor; liens for claims against. The contractor shall be entitled to recover upon a lien filed by him only such amount as may be due to him according to the terms of his contract, after deducting all claims of other parties for work done and materials furnished, as aforesaid; and in all cases where a lien shall be filed, under this chapter, for work done or materials furnished to any contractor, he shall defend any action brought thereupon at his own expense; and during the pendency of such action, the owner may withhold from the contractor the

amount of money for which [such] lien is filed; and in case of judgment against the owner or his property, upon the lien, the said owner shall be entitled to deduct from any amount due or to become due by him to the contractor, the amount of such judgment and costs; and if the amount of such judgment and costs shall exceed the amount due by him to the contractor, or if the owner shall have settled with the contractor in full, he shall be entitled to recover back from the contractor any amount so paid by him, the said owner, in excess of the contract price, and for which the contractor was originally the party liable. En. March 11, 1872. Am'd. 1873-4, 411.

Cal. Rep. Cit. 55, 392; 78, 200; 99, 634; 107, 275; 123, 533; 123, 534; 146, 284; 146, 285.

§ 1194. Court to declare rank of liens. Deficiency to be docketed. In every case in which different liens are asserted against any property, the court in the judgment must declare the rank of each lien, or class of liens, which shall be in the following order, viz.:

1. All persons performing manual labor in, or about the same.

2. Persons furnishing materials.

3. Subcontractors.

4. Original contractors.

And the proceeds of the sale of the property must be applied to each lien or class of liens in the order of its rank; and whenever, in the sale of the property subject to the lien, there is a deficiency of proceeds, judgment may be docketed for the deficiency in like manner and with like effect as in actions for the foreclosure of mortgages. En. March 11, 1872. Am'd. 1873-4, 412; 1885, 145.

Cal. Rep. Cit. 55, 391; 55, 392; 78, 199; 78, 200; 90, 376; 90, 548; 92, 237; 107, 197; 126, 684; 126, 685; 135, 640; 135, 641.

Deficiency judgment: Ante, sec. 726.

§ 1195. Any number of lienholders may join in action. Any number of persons claiming liens may join in the same action, and when separate actions are commenced, the court may consolidate them. The court must also allow, as a part of the costs, the money paid for filing and recording the lien, and reasonable attorneys' fees in the superior and supreme courts, such costs, and attorneys' fees to be allowed to each lien claimant whose lien is es-

established, whether he be plaintiff or defendant, or whether they all join in one action, or separate actions are consolidated. En. March 11, 1872. Am'd. 1873-4, 412; 1885, 146.

Cal. Rep. Cit. 60, 440; 68, 263; 72, 397; 74, 279; 74, 535; 76, 582; 78, 200; 80, 281; 84, 539; 87, 513; 88, 42; 90, 548; 91, 554; 94, 193; 94, 194; 94, 232; 99, 634; 100, 490; 106, 234; 107, 195; 107, 275; 110, 165; 115, 5; 124, 516; 127, 328; 127, 642; 140, 507; 146, 285.

Consolidation of actions—Generally: Ante, sec. 1048.

§ 1196. Attachment, etc., against materials. Whenever materials shall have been furnished for use in the construction, alteration or repair, of any building or other improvement, such materials shall not be subject to attachment, execution, or other legal process, to enforce any debt due by the purchaser of such materials, except a debt due for the purchase money thereof, so long as in good faith the same are about to be applied to the construction, alteration, or repair of such building, mining claim, or other improvement. En. March 11, 1872. Am'd. 1873-4, 412.

§ 1197. Lien does not impair right to proceed for recovery of the debt. Nothing contained in this chapter shall be construed to impair or affect the right of any person to whom any debt may be due for work done or materials furnished to maintain a personal action to recover such debt against the person liable therefor. En. March 11, 1872. Am'd. 1873-4, 351.

Cal. Rep. Cit. 70, 221; 95, 394; 107, 197.

§ 1198. Rules of practice. Except as otherwise provided in this chapter, the provisions of part two of this code are applicable to and constitute the rules of practice in the proceedings mentioned in this chapter. En. March 11, 1872.

See ante, secs. 307 et seq.

§ 1199. New trials and appeals. The provisions of part two of this code relative to new trials and appeals, except in so far as they are inconsistent with the provisions of this chapter, apply to the proceedings mentioned in this chapter. En. March 11, 1872.

Cal. Rep. Cit. 61, 353.

See ante, secs. 656 et seq. and secs. 936 et seq.

§ 1200. Where contractor fails to perform contract. In case the contractor shall fail to perform his contract in full, or shall abandon the same before completion, the portion of the contract price applicable to the liens of other persons than the contractor shall be fixed as follows: From the value of the work and materials already done and furnished at the time of such failure or abandonment, including materials then actually delivered or on the ground, which shall thereupon belong to the owner, estimated as near as may be by the standard of the whole contract price, shall be deducted the payments then due and actually paid, according to the terms of the contract and the provisions of sections one thousand one hundred and eighty-three and one thousand one hundred and eighty-four, and the remainder shall be deemed the portion of the contract price applicable to such liens. En. Stats. 1885, 146.

Cal. Rep. Cit. 90, 593; 94, 237; 102, 444; 105, 118; 132, 495.

§ 1201. Written consent to waive claims. It shall not be competent for the owner and contractor, or either of them, by any term of their contract, or otherwise, to waive, affect, or impair the claims and liens of other persons, whether with or without notice, except by their written consent, and any term of the contract to that effect shall be null and void. En. Stats. 1885, 146.

Cal. Rep. Cit. 97, 188; 133, 245; 146, 271.

§ 1202. What forfeits liens. Any person who shall willfully give a false notice of his claim to the owner, under the provisions of section one thousand one hundred and eighty-four, shall forfeit his lien. Any person who shall willfully include in his claim, filed under section one thousand one hundred and eighty-seven, work or materials not performed upon or furnished for the property described in the claim shall forfeit his lien. If the owner and his contractor shall directly or indirectly conspire to or agree that the written contract filed shall appear to show the contract price to be less than it really is, and it shall accordingly so show, then such contract shall be wholly void, and no recovery shall be had thereon by either party thereto, and in such case the labor done and materials furnished by all persons except the contractor,

shall be deemed to have been done and furnished at the personal instance of the owner and they shall have a lien for the value thereof. En. Stats. 1885, 146.

Cal. Rep. Cit. 91, 365; 91, 366; 106, 235.

§ 1203. **Bond of contractor to be filed.** Every contract required to be filed under the provisions of this chapter shall be accompanied by a good and sufficient bond in an amount equal to at least twenty-five per cent of the contract price, which said bond shall be filed at the same time and in the same manner as herein provided for the filing of such contract or memorandum thereof. Said bond shall, by its terms, be made to inure to the benefit of any and all persons who perform labor for or furnish materials to the contractor or any person acting for him or by his authority; and any such person shall have an action to recover upon said bond, against the principal and sureties, or either of them, for the value of such labor or materials, or both, not exceeding the amount of the bond; but such action shall not affect his lien nor any action to foreclose the same, except that there shall be but one satisfaction of his claim, with costs and counsel fees. Any failure to comply with the provision of this section shall render the owner and contractor jointly and severally liable in damages to any and all materialmen, laborers and subcontractors entitled to liens upon the property affected by said contract. En. Stats. 1885, 147. Rep. 1887, 155. En. 1893, 202.

Cal. Rep. Cit. 127, 387; 128, 145; 128, 146; 128, 147; 128, 667; 128, 668; 128, 669; 129, 394; 133, 374; 136, 57; 136, 126; 138, 544; 138, 546; 139, 193; 139, 194; 139, 326; 139, 380; 140, 489; 145, 206.

CHAPTER III.

CERTAIN LIENS FOR SALARIES AND WAGES.

- § 1204. Wages and salaries preferred claims in cases of assignments.
- § 1205. Priority of wages in case of death of employer.
- § 1206. Same in cases of execution or attachment.
- § 1207. Dispute of claim or portion thereof—Costs.

§ 1204. Wages and salaries preferred claims in cases of assignments. In all assignments of property made by any R. & R. §1204a
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person to trustees or assignees, on account of the inability of the person, at the time of the assignment, to pay his debts, or in proceedings in insolvency, the wages and salaries of the miners, mechanics, salesmen, servants, clerks, laborers employed by such person or any other person, who renders services or performs work to the amount of one hundred dollars each, and for services rendered within sixty days previously, are preferred claims, and must be paid by such trustees or assignees before any other creditor or creditors of the assignor. En. March 11, 1872. Am'd. 1873-4, 352; 1893, 97.

Cal. Rep. Cit. 84, 559; 125, 417.

Assignments for benefit of creditors: Civ. Code, secs. 3449-3473.

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§ 1205. Priority of wages in case of death of employer. In case of the death of any employer, the wages of each miner, mechanic, salesman, clerk, servant, laborer, or any other person who renders services, or performs work for services rendered within the sixty days next preceding the death of the employer, not exceeding one hundred dollars, rank in priority next after the funeral expenses, expenses of the last sickness, the charges and expenses of administering upon the estate, and the allowance to the widow and infant children and must be paid before other claims against the estate of the deceased person. En. March 11, 1872. Am'd. 1873-4, 352; 1893, 97.

Cal. Rep. Cit. 122, 463.

Estates of deceased persons, payment of debts, generally: Post, secs. 1643 et seq.

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§ 1206. Same, In cases of execution or attachment. In cases of executions, attachments, and writs of a similar nature, issued against any person, except for claims for labor done, any miners, mechanics, salesmen, servants, clerks and laborers, or any other person who renders services or performs work, who have claims against the defendant for labor done or work performed, may give notice of their claims, and the amount thereof, sworn to by the person making the claim, to the creditor and the officer executing either of such writs, at any time before the actual sale of property levied on, or, in the event of a

levy upon money, at any time before the transfer of such money under execution; and, unless such claim is disputed by the debtor or a creditor, such officer must pay to such person, out of the proceeds of the sale, or in the event of a levy on money, out of such money, the amount each is entitled to receive for services rendered within the sixty days next preceding the levy of the writ, not exceeding one hundred dollars. If any or all of the claims so presented and claiming preference under this section are disputed by either the debtor or a creditor, the person presenting the same must commence an action within ten days for the recovery thereof, and must prosecute his action with due diligence, or be forever barred from any claim or priority of payment thereof; and the officer shall retain possession of so much of the proceeds of the sale or money as may be necessary to satisfy such claim until the determination of such action; and in case judgment be had for the claim, or any part thereof, carrying costs, the costs taxable therein shall likewise be a preferred claim with the same rank as the original claim. En. March 11, 1872. Am'd. 1873-4, 352; 1893, 87.

Cal. Rep. Cit. 63, 382; 63, 383; 81, 271; 81, 273; 83, 223; 83, 224; 115, 145; 115, 147; 115, 148; 115, 149; 122, 533; 128, 43; 128, 44; 141, 400; 141, 401; 141, 402.

§ 1207. Dispute of claim or portion thereof—Costs. The debtor or creditor intending to dispute a claim presented under the provisions of the last section shall, within ten days after receiving notice of such claim, serve upon the claimant and the officer executing the writ a statement in writing, verified by the oath of the debtor or the person disputing such claim, setting forth that no part of said claim, or not exceeding a sum specified, is justly due from the debtor to the claimant for services rendered within the sixty days next preceding the levy of the writ. If the claimant bring suit on a claim which is disputed in part only and fail to recover a sum exceeding that which was admitted to be due, he shall not recover costs, but costs shall be adjudged against him. En. Stats. 1883, 47.

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Cal. Rep. Cit. 83, 223; 115, 145; 128, 44.

PART III.

TITLE IV.

CHAPTER IV.

[Chapter added March 21, 1905. Stats. 1905, 632.]

CERTAIN LIENS UPON ANIMALS.

§ 1208. Liens arising from acts done in preventing cruelty to animals, how enforced.

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§ 1208. Lien upon certain animals. Any person having a lien upon any animal or animals under the provisions of sections five hundred and ninety-seven a, or five hundred and ninety-seven b, of the Penal Code may satisfy such lien as follows: If such lien be not discharged and satisfied, by the person responsible, within three days after the obligation becomes due, then the person holding such lien may resort to the proper court to satisfy the claim; or he, three days after the charges against such property become due, may sell the same, or such undivided fraction thereof as may become necessary, to defray the amount due and costs of sale, by giving three days' notice of the sale by advertising in some newspaper published in the county, or city and county, in which the lien has attached to the property; or, if there is no paper published in the county, then by posting notices of the sale in three of the most public places in the town or township for three days previous to the sale. Said notices shall contain an accurate description of the property to be sold, together with the terms of sale, which must be for cash, payable on the consummation of the sale. The proceeds of the sale must be applied to the discharge of the lien and the costs of sale; the remainder, if any, must be paid over to the owner, if known, and if not known must be paid into the treasury of the humane society of the county, or city and county, wherein the sale takes place; if no humane society exists in the county, then the remainder shall be paid into the county treasury. En. Stats. 1905, 632.

This is merely a codification of the provisions concerning foreclosure of liens in the statutes of 1873-4, page 499, and 1901, page 285, relating to cruelty to animals, the penal features whereof have already been codified into the Penal Code and the civil features into the Civil Code.—Code Commissioner's Note.

TITLE V.

OF CONTEMPTS.

- § 1209. What acts or omissions are contempts.
- 1210. Re-entry on property after eviction, when a contempt.
- 1211. A contempt committed in the presence of the court may be punished summarily. When not so committed, an affidavit or statement shall be made.
- 1212. A warrant of attachment may issue or a notice to show cause.
- 1213. Bail may be given by a person arrested under such warrant.
- 1214. Sheriff must, upon executing the warrant, arrest and detain the person until discharged.
- 1215. Bail bond, form and conditions of.
- 1216. Officer must return warrant and undertaking, if any.
- 1217. Hearing.
- 1218. Judgment and penalty, if guilty.
- 1219. If the contempt is the omission to perform any act, the person may be imprisoned until performance.
- 1220. If a party fail to appear, proceedings.
- 1221. Illness sufficient cause for nonappearance of party arrested. Confinement under arrests for contempt.
- 1222. Judgment and orders in such cases final.

§ 1209. What acts or omissions are contempts. The following acts or omissions in respect to a court of justice, or proceedings therein, are contempts of the authority of the court: §1209
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1. Disorderly, contemptuous, or insolent behavior toward the judge while holding the court, tending to interrupt the due course of a trial or other judicial proceeding.

2. A breach of the peace, boisterous conduct or violent disturbance, tending to interrupt the due course of a trial or other judicial proceeding.

3. Misbehavior in office, or other willful neglect or violation of duty by an attorney, counsel, clerk, sheriff, coroner, or other person, appointed or elected to perform a judicial or ministerial service.

4. Deceit or abuse of the process or proceedings of the court by a party to an action or special proceeding.

5. Disobedience of any lawful judgment, order or process of court.

6. Assuming to be an officer, attorney, counsel of a court, and acting as such, without authority.

7. Rescuing any person or property, in the custody of an officer, by virtue of an order or process of such court.

8. Unlawfully detaining a witness, or party to an action, while going to, remaining at, or returning from the court where the action is on the calendar for trial.

9. Any other unlawful interference with the process or proceedings of a court.

10. Disobedience of a subpoena duly served, or refusing to be sworn or answer as a witness.

11. When summoned as a juror in a court, neglecting to attend or serve as such, or improperly conversing with a party to an action, to be tried at such court, or with any other person, in relation to the merits of such action, or receiving a communication from a party or other person in respect to it, without immediately disclosing the same to the court.

12. Disobedience by an inferior tribunal, magistrate, or officer, of the lawful judgment, order, or process of a superior court, or proceeding in an action or special proceeding contrary to law, after such action or special proceeding is removed from the jurisdiction of such inferior tribunal, magistrate, or officer. Disobedience of the lawful orders or process of a judicial officer is also a contempt of the authority of such officer. But no speech or publication reflecting upon or concerning any court or any officer thereof shall be treated or punished as a contempt of such court, unless made in the immediate presence of such court while in session, and in such a manner as to actually interfere with its proceedings. En. March 11, 1872. Am'd. 1891, 6.

Cal. Rep. Cit. 47, 133; 53, 207; 64, 345; 64, 439; 65, 192; 67, 645; 69, 4; 69, 17; 69, 543; 69, 585; 84, 55; 90, 556; 94, 334; 99, 361; 119, 422; 140, 5; 140, 9; 140, 12; 140, 14; 140, 15; 140, 16; 140, 215; 147, 161. Subd. 3—64, 438; 64, 598. Subd. 4—73, 241. Subd. 5—90, 556; 99, 529; 140, 4. Subd. 6—64, 598. Subd. 9—64, 438; 69, 31; 85, 607; 99, 529; 140, 4. Subd. 10—70, 53; 72, 512; 140, 4.

Prac. Act, sec. 480. En. April 29, 1851.

Cal. Rep. Cit. 7, 182.

Powers of courts: Ante, secs. 128, 177, 178.

Juror willfully failing to attend: Ante, sec. 238.

Dispossession of party placed in possession under process: Post, sec. 1210.

In justices' courts: Ante, secs. 906-910.

Misbehavior of attorney: Ante, secs. 287 et seq.

Disobedience of lawful judgment or order—By executor: Post, sec. 1440.

Disobedience of citation in probate court: Post, secs. 1440, 1460, 1461.

Disobedience of witness: Post, secs. 1991-1994.

Disobedience of mandate: Ante, sec. 1097.

Supervisors, power of to punish for contempt: See Pol. Code, sec. 4047.

§1210 § 1210. Re-entry on property after eviction, when a contempt. Every person dispossessed or rejected from or p. 484

out of any real property by the judgment or process of any court of competent jurisdiction, and who, not having right so to do, re-enters into or upon or takes possession of any such real property, or induces or procures any person not having right so to do, or aids or abets him therein, is guilty of a contempt of the court by which such judgment was rendered or from which such process issued. Upon a conviction for such contempt the court must immediately issue an alias process, directed to the proper officer, and requiring him to restore such possession to the party entitled under the original judgment or process (or to his lessor or to his grantor). And no appeal from the order directing the issuance of an alias writ of possession shall stay the execution thereof, unless a written undertaking be executed on the part of the appellant, with two or more sureties, to the effect that he will not commit or suffer to be committed any waste therein, and if the order be affirmed or the appeal dismissed, he will pay the value of the use and occupation of the property from the time of his unlawful re-entry until the delivery of the possession thereof, pursuant to the judgment or order, not exceeding a sum to be fixed by the judge of the court by which the order for the alias writ was made, and which must be specified in the undertaking. En. March 11, 1872. Am'd. 1893, 281.

Cal. Rep. Cit. 52, 508; 62, 480; 69, 4; 70, 212; 135, 320.

§ 1211. A contempt committed in the presence of the court may be punished summarily. When not so committed, an affidavit or statement shall be made. When a contempt is committed in the immediate view and presence of the court, or judge at chambers, it may be punished summarily; for which an order must be made, reciting the facts as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of a contempt, and that he be punished as therein prescribed. When the contempt is not committed in the immediate view and presence of the court, or judge at chambers, an affidavit shall be presented to the court or judge, of the facts constituting the contempt or a statement of the facts by the referees or arbitrators, or other judicial officer. En. March 11, 1872.

Cal. Rep. Cit. 60, 93; 71, 240; 73, 497; 77, 200; 77, 201; 92, 480; 126, 245; 131, 284; 140, 2; 140, 217; 146, 133.

Prac. Act, sec. 481. En. April 29, 1851.

Cal. Rep. Cit. 7, 183; 42, 415.

Contempt away from court, attachment: Post, secs. 1212 et seq.

Reciting the facts: Post, sec. 1219.

§ 1212. A warrant of attachment may issue or a notice to show cause. When the contempt is not committed in the immediate view and presence of the court or judge, a warrant of attachment may be issued to bring the person charged to answer, or, without a previous arrest, a warrant of commitment may upon notice or upon an order to show cause be granted; and no warrant of commitment can be issued without such previous attachment to answer, or such notice or order to show cause. En. March 11, 1872.

Cal. Rep. Cit. 59, 421; 60, 6; 65, 191; 73, 497; 126, 245.

Prac. Act, sec. 482. En. April 29, 1851.

§ 1213. Bail may be given by a person arrested under such warrant. Whenever a warrant of attachment is issued, pursuant to this title, the court or judge must direct by an indorsement on such warrant, that the person charged may be let to bail for his appearance in an amount to be specified in such indorsement. En. March 11, 1872.

Prac. Act, sec. 483. En. April 29, 1851. Am'd. 1859, 140.

§ 1214. Sheriff must, upon executing the warrant, arrest and detain the person until discharged. Upon executing the warrant of attachment, the sheriff must keep the person in custody, bring him before the court or judge, and detain him until an order be made in the premises, unless the person arrested entitle himself to be discharged, as provided in the next section. En. March 11, 1872.

Prac. Act, sec. 484. En. April 29, 1851.

§ 1215. Bail bond, form and conditions of. When a direction to let the person arrested to bail is contained in the warrant of attachment, or indorsed thereon, he must be discharged from the arrest upon executing and delivering to the officer, at any time before the return day of the warrant, a written undertaking, with two sufficient sureties, to the effect that the person arrested will appear on the return of the warrant and abide the order of the court or judge thereupon; or they will pay, as may be directed, the sum specified in the warrant. En. March 11, 1872.

Prac. Act, sec. 485. En. April 29, 1851.

§ 1216. Officer must return warrant and undertaking, if any. The officer must return the warrant of arrest and

undertaking, if any, received by him from the person arrested, by the return day specified therein. En. March 11, 1872.

Prac. Act, sec. 486. En. April 29, 1851.

Cal. Rep. Cit. 45, 7.

§ 1217. Hearing. When the person arrested has been brought up or appeared, the court or judge must proceed to investigate the charge and must hear any answer which the person arrested may make to the same, and may examine witnesses for or against him, for which an adjournment may be had from time to time, if necessary. En. March 11, 1872.

Cal. Rep. Cit. 60, 93; 69, 4; 73, 497; 119, 423.

Prac. Act, sec. 487. En. April 29, 1851.

§ 1218. Judgment and penalty, if guilty. Upon the answer and evidence taken the court or judge must determine whether the person proceeded against is guilty of the contempt charged, and if it be adjudged that he is guilty of the contempt, a fine may be imposed on him not exceeding five hundred dollars, or he may be imprisoned not exceeding five days, or both. En. March 11, 1872.

Cal. Rep. Cit. 60, 93; 64, 438; 69, 3; 73, 497; 94, 334; 119, 58; 122, 204.

Prac. Act, sec. 488. En. April 29, 1851.

Cal. Rep. Cit. 6, 321; 32, 88; 44, 478.

§ 1219. If the contempt is the omission to perform any act, the person may be imprisoned until performance. When the contempt consists in the omission to perform an act which is yet in the power of the person to perform, he may be imprisoned until he have performed it, and in that case the act must be specified in the warrant of commitment. En. March 11, 1872.

Cal. Rep. Cit. 47, 133; 69, 3; 69, 4; 81, 67; 83, 462; 90, 556; 119, 58; 122, 203; 122, 204; 140, 218.

Prac. Act, sec. 489. En. April 29, 1851.

Cal. Rep. Cit. 6, 321; 7, 177; 44, 478.

Executor or administrator, contempt: Post, sec. 1440.

§ 1220. If a party fail to appear, proceedings. When the warrant of arrest has been returned served, if the person arrested do not appear on the return day, the court or judge may issue another warrant of arrest, or may order the undertaking to be prosecuted or both. If the under-

taking be prosecuted, the measure of damages in the action is the extent of the loss or injury sustained by the aggrieved party, by reason of the misconduct for which the warrant was issued, and the costs of the proceeding. En. March 11, 1872.

Prac. Act, sec. 491. En. April 29, 1851.

§ 1221. Illness sufficient cause for nonappearance of party arrested. Confinement under arrests for contempt. Whenever, by the provisions of this title, an officer is required to keep a person arrested on a warrant of attachment in custody, and to bring him before a court or judge, the inability, from illness or otherwise, of the person to attend is sufficient excuse for not bringing him up; and the officer must not confine a person arrested upon the warrant in a prison, or otherwise restrain him of personal liberty, except so far as may be necessary to secure his personal attendance. En. March 11, 1872.

Prac. Act, sec. 492. En. April 29, 1851.

§ 1222. Judgment and orders in such cases final. The judgment and orders of the court or judge, made in cases of contempt, are final and conclusive. En. March 11, 1872.

Cal. Rep. Cit. 52, 508; 62, 481; 65, 30; 65, 31; 69, 543; 77, 201; 81, 66; 88, 624; 90, 554; 90, 556; 90, 558; 99, 361; 118, 141.

Prac. Act, sec. 493. En. April 29, 1851.

Cal. Rep. Cit. 52, 508.

TITLE VI.

OF THE VOLUNTARY DISSOLUTION OF CORPORATIONS.

§ 1227. How dissolved.

§ 1228. Application, what to contain.

§ 1229. Application, how signed and verified.

§ 1230. Filing application and publication of notice.

§ 1231. Objections may be filed.

§ 1232. Hearing of application.

§ 1233. Judgment-roll and appeals.

§ 1234. Application by savings and loan society.

§ 1227. How dissolved. A corporation may be dissolved by the superior court of the county where its principal place of business is situated, upon its voluntary application for that purpose. En. March 11, 1872. Am'd. 1877-8, 108; 1880, 109.

Cal. Rep. Cit. 81, 386; 81, 387; 84, 365.

Voluntary dissolution, receiver: Ante, sec. 565.

Involuntary dissolution: Ante, secs. 802 et seq.

§ 1228. Application, what to contain. The application must be in writing, and must set forth:

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1. That at a meeting of the stockholders or members called for that purpose, the dissolution of the corporation was resolved upon by a two-third vote of all the stockholders or members. sp. 485

2. That all claims and demands against the corporation have been satisfied and discharged. En. March 11, 1872.

§ 1229. Application, how signed and verified. The application must be signed by a majority of the board of trustees, directors, or other officers having the management of the affairs of the corporation, and must be verified in the same manner as a complaint in a civil action. En. March 11, 1872.

Cal. Rep. Cit. 47, 133.

Verification: Ante, sec. 446.

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§ 1230. Filing application and publication of notice. If the court is satisfied that the application is in conformity with this title, the judge thereof must order it to be filed with the clerk, and that the clerk give not less than thirty nor more than fifty days' notice of the application, by publication in some newspaper published in the county; and if there are none such, then by advertisements posted up in three of the principal public places in the county. En. March 11, 1872. Am'd. 1877-8, 108; 1880, 109.

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§ 1231. Objections may be filed. At any time before the expiration of the time of publication, any person may file his objections to the application. En. March 11, 1872.

§ 1232. Hearing of application. After the time of publication has expired, the court may, upon five days' notice to the persons who have filed objections or without further notice, if no objections have been filed, proceed to hear and determine the application, and if all the statements therein made are shown to be true, must declare the corporation dissolved. En. March 11, 1872. Am'd. 1877-8, 108.

Notices, service, etc.: Ante, secs. 1010 et seq.

§ 1233. Judgment-roll and appeals. The application, notices, and proof of publication, objections (if there be any) and declaration of dissolution, constitute the judgment-roll; and from the judgment an appeal may be taken as from other judgments of the superior courts. En. March 11, 1872. Am'd. 1877-8, 103; 1880, 109.

§1234 Cal. Rep. Cit. 81, 386; 81, 387; 84, 365.

Am'd. Appeals to supreme court: Ante, secs. 963-966.

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§ 1234. Application by savings and loan society. If the applicant be a savings and loan association, or engaged in the business of receiving money on deposit and there be any unclaimed deposit or dividend in its hands belonging to a person whose whereabouts are unknown to the trustees, directors, or other officers presenting the application, and the application shall set forth the name of the person making such deposit or entitled to such dividend, the time when such deposit was made or dividend declared, the residence, if known, of such person at the time of such deposit, the amount of such deposit or dividend, and the fact that the whereabouts of such person are known. The same facts shall be stated in the notice of the application given by the clerk. If, at any time before the expiration of the time of publication, any person shall file a claim to such deposit or dividend, the court shall, at the hearing and upon five days' notice to him, hear and determine his claim, and if such claim be established, order such money to be paid to him. All such deposits or dividends not so claimed, or as to which no claim shall be established, shall, upon order of the court, be paid into the state treasury, accompanied with a copy of the order, which shall set forth the facts hereinbefore required to be stated concerning such deposits or dividends; and, upon production of the treasurer's receipt for such payment, the court may proceed to declare the corporation dissolved as in other cases. All unclaimed deposits and dividends so paid into the state treasury shall be received, invested, accounted for, and paid out, in the same manner and by the same officers as is provided by law in the case of escheated estates and in section twelve hundred and seventy-two of this code. En. Stats. 1897, 33.

TITLE VII.

OF EMINENT DOMAIN.

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- § 1238. Purposes for which it may be exercised.
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- § 1259. When title takes effect.
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- § 1263. Exceptions.
- § 1264. Preference of proceedings over other civil actions.

Gen. Cit. to Title—Cal. Rep. Cit. 64, 125; 67, 431; 68, 63; 69, 301; 119, 165.

§ 1237. Eminent domain defined. Eminent domain is the right of the people or government to take private property for public use. This right may be exercised in the manner provided in this title. En. March 11, 1872.

Cal. Rep. Cit. 87, 231; 91, 245; 91, 247; 91, 248; 130, 634; 138, 582; 145, 587.

Constitutional provisions: See Const. Cal., art. 1, sec. 14; art. 12, sec. 8; art. 15, sec. 1.

State may exercise right of: Pol. Code, sec. 44.

§ 1238. Purposes for which it may be exercised. Subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following public uses:

1. Fortifications, magazines, arsenals, navy yards, navy and army stations, lighthouses, range and beacon lights,

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coast surveys, and all other public uses authorized by the government of the United States.

2. Public buildings and grounds for the use of the state, and all other public uses authorized by the legislature of the state.

3. Public buildings and grounds for the use of any county, incorporated city, or city and county, village, town or school districts; canals, aqueducts, reservoirs, tunnels, flumes, ditches or pipes for the conducting or storing water for the use of the inhabitants of any county, incorporated city, or city and county, village or town, or for the draining of any county, incorporated city, or city and county, village or town; raising the banks of streams, removing obstructions therefrom and widening and deepening or straightening their channels, roads, streets and alleys, public mooring places for water craft, public parks, including parks and other places covered by water and all other public uses for the benefit of any county, incorporated city, or city and county, village or town, or the inhabitants thereof, which may be authorized by the legislature; but the mode of apportioning and collecting the costs of such improvements shall be such as may be provided in the statutes by which the same may be authorized.

4. Wharves, docks, piers, chutes, booms, ferries, bridges, toll-roads, by-roads, plank and turnpike roads; paths and roads either on the surface, elevated or depressed, for the use of bicycles, tricycles, motor-cycles and other horseless vehicles, steam, electric and horse railroads, canals, ditches, dams, pondings, flumes, aqueducts, and pipes for irrigation, public transportation, supplying mines and farming neighborhoods with water, and draining and reclaiming lands, and for floating logs and lumber on streams not navigable.

5. Roads, tunnels, ditches, flumes, pipes and dumping places for working mines; also outlets, natural or otherwise, for the flow, deposit, or conduct of tailings or refuse matter from the mines; also an occupancy in common by the owners or possessors of different mines of any place, for the flow, deposit or conduct of tailings or refuse matter from their several mines.

6. By-roads leading from highways to residences, farms, mines, mills, factories and buildings for operating machinery, or necessary to reach any property used for public purposes.

7. Telegraph and telephone lines.

§ 1238. Subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following public uses:

1. Fortifications, magazines, arsenals, navy yards, navy and army stations, lighthouses, range and beacon lights, coast surveys, and all other public uses authorized by the government of the United States.

2. Public buildings and grounds for the use of the state, and all other public uses authorized by the legislature of the state.

3. Public buildings and grounds for the use of any county, incorporated city, or city and county, village, town or school districts; canals, aqueducts, reservoirs, tunnels, flumes, ditches or pipes for conducting or storing water for the use of the inhabitants of any county, incorporated city, or city and county, village or town, or for draining any county, incorporated city, or city and county, village or town; raising the banks of streams, removing obstructions therefrom, and widening and deepening or straightening their channels, roads, streets and alleys; public mooring places for water craft, public parks, including parks and other places covered by water, and all other public uses for the benefit of any county, incorporated city, or city and county, village or town, or the inhabitants thereof, which may be authorized by the legislature; but the mode of apportioning and collecting the costs of such improvements shall be such as may be provided in the statutes by which the same may be authorized.

4. Wharves, docks, piers, chutes, booms, ferries, bridges, toll roads, byroads, plank, and turnpike roads; paths and roads either on the surface, elevated, or depressed, for the uses of bicycles, tricycles, motorcycles and other horseless vehicles, steam, electric, and horse railroads, canals, ditches, dams, pondings, flumes, aqueducts and pipes for irrigation, public transportation, supplying mines and farming neighborhoods with water, and draining and reclaiming lands, and for floating logs and lumber on streams not navigable.

5. Roads, tunnels, ditches, flumes, pipes and dumping places for working mines; also outlets, natural or otherwise, for the flow, deposit, or conduct of tailings or refuse matter from mines; also an occupancy in common by the owners or possessors of different mines of any place for the flow, deposit, or conduct of tailings or refuse matter from their several mines.

6. By-roads leading from highways to residences, farms, mines, mills, factories and buildings for operating machinery, or necessary to reach any property used for public purposes.

7. Telegraph and telephone lines.

8. Sewerage of any incorporated city, city and county, or of any village or town, whether incorporated or unincorporated, or of any settlement consisting of not less than ten families, or of any public buildings belonging to the state, or to any college or university.

9. Roads for transportation by traction engines or road locomotives.

10. Oil pipe-lines.

11. Roads and flumes for logging or lumbering purposes.

12. Canals, reservoirs, dams, ditches, flumes, aqueducts and pipes for supplying and storing water for the operation of machinery for the purpose of generating and transmitting electricity for the supply of mines, quarries, railroads, tramways, mills, and factories with electric power; and also for the supplying of electricity to light or heat mines, quarries, mills, factories, incorporated cities and counties, villages or towns; and also for furnishing electricity for lighting, heating or power purposes to individuals or corporations, together with lands, buildings and all other improvements in or upon which to erect, install, place, use or operate machinery for the purpose of generating and transmitting electricity for any of the purposes or uses above set forth.

13. Electric power lines, electric heat lines; and electric light, heat and power lines.

14. Cemeteries for the burial of the dead, and enlarging and adding to the same and the grounds thereof.

15. The plants, or any part thereof or any record therein, of all persons, firms or corporations heretofore, now or hereafter engaged in the business of searching public records, or publishing public records or insuring or guaranteeing titles to real property, including all copies of, and all abstracts or memoranda taken from, public records, which are owned by or in the possession of such persons, firms or corporations, or which are used by them in their respective businesses; provided, however, that the right of eminent domain in behalf of the public uses mentioned in this subdivision may be exercised only for the purpose of restoring or replacing, in whole or in part, public records, or the substance of public records, of any city, city and county, county or other municipality, which records have been, or may hereafter be, lost or destroyed by conflagration or other public calamity; and provided further, that such right shall be exercised only by the city, city and county, county or municipality, whose records, or part of whose records, have been, or may be, so lost or destroyed. [In effect June 14, 1906.]

8. Sewerage of any incorporated city, city and county, or of any village or town, whether incorporated or unincorporated, or of any settlement consisting of not less than ten families, or of any public buildings belonging to the state, or to any college or university.

9. Roads for transportation by traction engines or road locomotives.

10. Oil pipe-lines.

11. Roads and flumes for logging or lumbering purposes.

12. Canals, reservoirs, dams, ditches, flumes, aqueducts and pipes for supplying and storing water for the operation of machinery for the purpose of generating and transmitting electricity for the supply of mines, cars, railroads, tramways, mills, and factories with electric power; and also for the supplying of electricity to light or heat mines, cars, mills, factories, incorporated cities and counties, villages or towns; and also for furnishing electricity for lighting, heating or power purposes to individuals or corporations, together with lands, buildings and all other improvements in or upon which to erect, install, place, use or operate machinery for the purpose of generating and transmitting electricity for any of the purposes or uses above set forth.

13. Electric power lines, electric heat lines; and electric light, heat and power lines.

14. Cemeteries for the burial of the dead, and enlarging and adding to the same and the grounds thereof. En. March 11, 1872. Am'd. 1873-4, 353; 1891, 48; 1893, 146; 1895, 89; 1897, 70; 1900-01, 72; 1905, 637.

Cal. Rep. Cit. 51, 271; 51, 272; 65, 390; 69, 302; 79, 165; 87, 232; 91, 255; 143, 570. Subd. 3—62, 182; 62, 183; 67, 660; 92, 531; 95, 111; 95, 112; 98, 622; 119, 165; 132, 237. Subd. 4—53, 227; 56, 596; 76, 370; 79, 161; 79, 550; 97, 679; 111, 227; 134, 414; 136, 49; 144, 214. Subd. 5—51, 271; 51, 272; 63, 73; 73, 484; 73, 485; 108, 90. Subd. 8—91, 248; 91, 253.

Eminent domain, generally: See Civ. Code, sec. 1001.

Condemnation of state land for governmental purposes:

Pol. Code, secs. 33, 34.

Road purposes: Pol. Code, sec. 2690.

Toll-roads: Pol. Code, sec. 2787.

Toll-bridge or ferry: Pol. Code, sec. 2855.

Wharves, chutes, and piers: Pol. Code, sec. 2913.

Reclamation purposes: Pol. Code, sec. 3471.

Streets or alleys: Pol. Code, sec. 4372.

§ 1239. Estates subject to public use. The following is a classification of the estates and rights in lands subject to be taken for public use:

1. A fee simple, when taken for public buildings or grounds, or for permanent buildings, for reservoirs and dams, and permanent flooding occasioned thereby, or for an outlet for a flow, or a place for the deposit of debris or tailings of a mine.

2. An easement, when taken for any other use.

3. The right of entry upon and occupation of lands, and the right to take therefrom such earth, gravel, stones, trees, and timber as may be necessary for some public use. En. March 11, 1872. Am'd. 1873-4, 355.

Cal. Rep. Cit. 56, 10; 62, 183; 62, 184; 67, 60; 67, 660; 92, 531; 124, 616. Subd. 3—111, 229.

§ 1240. Private property defined. Classes enumerated. Am'd. The private property which may be taken under this title p. 487 includes:

1. All real property belonging to any person;

2. Lands belonging to this state, including tide and submerged lands, not within the corporate limits of any city, or city and county, or to any county, incorporated city, or city and county, village or town, not appropriated to some public use;

3. Property appropriated to public use; but such property shall not be taken unless for a more necessary public use than that to which it has been already appropriated.

4. Franchises for toll roads, toll bridges, and ferries, and all other franchises, but such franchises shall not be taken unless for free highways, railroads, or other more necessary public use;

5. All rights of way for any and all the purposes mentioned in section twelve hundred and thirty-eight, and any and all structures and improvements thereon, and the lands held or used in connection therewith shall be subject to be connected with, crossed, or intersected by any other right of way or improvements, or structures thereon. They shall also be subject to a limited use, in common with the owner thereof, when necessary; but such uses, crossings, intersections and connections shall be made in manner most compatible with the greatest public benefit and least private injury.

No railroad main track crossing, outside the limits of any incorporated town, city or city and county, shall be at grade, unless the party proposing such crossing at grade shall, at its own sole cost and expense, protect such crossing by the construction, operation and maintenance of an interlocking plant, with suitable signals and

derails; but either party to such crossing may insist upon a separation of grades, in which case the cost of constructing such crossing with separate grades shall be equally divided between the railroad companies concerned; and provided further that where any such crossing has been constructed at grade, either company may, at any time thereafter, require a separation of the grades at such crossing, each company paying one-half of the expense of such separation; and provided further that the foregoing provisions shall not be construed as requiring a separation of grades where such separation is physically impracticable, and in case of any dispute or controversy as to the physical practicability of any undergrade or overhead crossing, the same shall be determined by the superior court of the county in which such crossing is situate in an action or proceeding brought by either party for that purpose.

6. All classes of private property not enumerated may be taken for public use, when such taking is authorized by law;

7. Proceedings to condemn lands belonging to this state are hereby authorized, and must be maintained and conducted in the same manner as are other condemnation proceedings provided for in this title; except, that in such proceedings the summons and a copy of the complaint must be served on the governor, attorney-general and surveyor general of this state. En. March 11, 1872. Am'd. 1900-01, 307; 1905, 126.

Cal. Rep. Cit. 62, 183; 111, 230. Subd. 1—145, 587; 145, 588. Subd. 2.—145, 587; 145, 588. Subd. 3—111, 227; 145, 587; 145, 588.

More necessary public use: Post, sec. 1241, subd. 3.

Crossings: Post, sec. 1247, subd. 1.

§ 1241. Facts necessary to be found by court before condemnation: Before property can be taken, it must appear:

1. That the use to which it is to be applied is a use authorized by law;

2. That the taking is necessary to such use;

3. If already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use. En. March 11, 1872.

Cal. Rep. Cit. 50, 506; 64, 131; 67, 62; 68, 63; 71, 480; 79, 161; 91, 253. Subd. 3—91, 256.

§ 1242. Parties may make location. May enter to make surveys. In all cases where land is required for public use, the state, or its agents in charge of such use, may survey and locate the same; but it must be located in the manner which will be most compatible, with the greatest public good and the least private injury, and subject to the provisions of section twelve hundred and forty-seven. The state, or its agents in charge of such public use, may enter upon the land and make examination, surveys and maps thereof, and such entry shall constitute no cause of action in favor of the owners of the land, except for injuries resulting from negligence, wantonness, or malice. En. March 11, 1872.

Cal. Rep. Cit. 76, 412; 76, 413; 91, 255; 122, 603; 129, 11; 133, 399.

State or its agents: Civ. Code, sec. 1001.

§ 1243. Jurisdiction in superior court. All proceedings under this title must be brought in the superior court of the county in which the property is situated. They must be commenced by filing a complaint and issuing a summons thereon. En. March 11, 1872. Am'd. 1880, 118.

Cal. Rep. Cit. 65, 395; 65, 410; 74, 263; 76, 410; 83, 496; 83, 497; 87, 231; 106, 205; 124, 647; 134, 589; 138, 580; 138, 582.

Complaint: Post, sec. 1244; generally: Ante, sec. 426.

Summons: Post, sec. 1245; generally: Ante, secs. 406 et seq.

§ 1244. The complaint and its contents. The complaint must contain:

1. The name of the corporation, association, commission, or person in charge of the public use for which the property is sought, who must be styled plaintiff.

2. The names of all owners and claimants of the property, if known, or a statement that they are unknown, who must be styled defendants.

3. A statement of the right of the plaintiff.

4. If a right of way be sought, the complaint must show the location, general route, and termini, and must be accompanied with a map thereof, so far as the same is involved in the action or proceeding.

5. A description of each piece of land sought to be taken, and whether the same includes the whole or only a part of an entire parcel or tract. All parcels lying in the county, and required for the same public use, may be included in the same or separate proceedings, at the op-

tion of the plaintiff, but the court may consolidate or separate them to suit the convenience of parties.

When application for the condemnation of a right of way for the purposes of sewerage is made on behalf of a settlement, or of an incorporated village or town, the board of supervisors of the county may be named as plaintiff. En. March 11, 1872. Am'd. 1873-4, 355; 1880, 118.

Cal. Rep. Cit. 67, 60; 67, 61; 67, 64; 83, 510; 87, 233; 124, 609; 132, 236; 134, 416. Subd. 4—91, 252; 122, 602; 134, 414. Subd. 5—76, 413; 122, 602.

§ 1245. **Summons, what to contain. How issued and served.** The clerk must issue a summons, which must contain the names of the parties, a general description of the whole property, a statement of the public use for which it is sought, and a reference to the complaint for descriptions of the respective parcels, and a notice to the defendants to appear and show cause why the property described should not be condemned as prayed for in the complaint. In all other particulars it must be in the form of a summons in civil actions, and must be served in like manner. En. March 11, 1872.

Summons generally, contents: Ante, secs. 407 et seq.; service: Ante, secs. 410 et seq.

§ 1246. **Who may defend.** All persons in occupation of, or having or claiming an interest in, any of the property described in the complaint, or in the damages for the taking thereof, though not named, may appear, plead, and defend, each in respect to his own property or interest, or that claimed by him, in like manner as if named in the complaint. En. March 11, 1872.

Cal. Rep. Cit. 87, 255; 124, 609.

Appearance, generally: Ante, sec. 1014.

Answer, counterclaim, and cross-complaint: Ante, secs. 437-442.

§ 1247. **Court shall have jurisdiction to regulate the mode of making crossings or of enjoying a common use.** The court shall have power:

1. To regulate and determine the place and manner of making connections and crossings, or of enjoying the common use mentioned in the fifth subdivision of section twelve hundred and forty;

2. To hear and determine all adverse or conflicting

claims to the property sought to be condemned, and to the damages therefor;

3. To determine the respective rights of different parties seeking condemnation of the same property. En. March 11, 1872.

Cal. Rep. Cit. 76, 412; 124, 609; 124, 613.

§ 1248. **Court or jury to assess damages.** The court, jury, or referee must hear such legal testimony as may be offered by any of the parties to the proceedings, and thereupon must ascertain and assess:

1. The value of the property sought to be condemned, and all improvements thereon pertaining to the realty, and of each and every separate estate or interest therein; if it consists of different parcels, the value of each parcel and each estate or interest therein shall be separately assessed.

2. If the property sought to be condemned constitutes only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned, by reason of its severance from the portion sought to be condemned, and the construction of the improvement in the manner proposed by the plaintiff.

3. Separately, how much the portion not sought to be condemned, and each estate or interest therein, will be benefited; if at all, by the construction of the improvement proposed by the plaintiff; and if the benefit shall be equal to the damages assessed under subdivision two, the owner of the parcel shall be allowed no compensation except the value of the portion taken; but if the benefit shall be less than the damages, so assessed, the former shall be deducted from the latter, and the remainder shall be the only damages allowed in addition to the value.

4. If the property sought to be condemned be water or the use of water, belonging to riparian owners, or appurtenant to any lands, how much the lands of the riparian owner, or the lands to which the property sought to be condemned is appurtenant, will be benefited, if at all, by a diversion of water from its natural course, by the construction and maintenance, by the person or corporation in whose favor the right of eminent domain is exercised, of works for the distribution and convenient delivery of water upon said lands; and such benefit, if any, shall be deducted from any damages awarded the owner of such property.

5. If the property sought to be condemned be for a railroad, the cost of good and sufficient fences along the line of such railroad, and the cost of cattle-guards where fences may cross the line of such railroad.

6. As far as practicable, compensation must be assessed for each source of damages separately. En. March 11, 1872. Am'd. 1889, 343.

Cal. Rep. Cit. 56, 9; 64, 111; 67, 64; 68, 63; 69, 206; 79, 551; 83, 514; 91, 452; 104, 27; 104, 28; 134, 415; 137, 622. Subd. 2—79, 550. Subd. 3—79, 550. Subd. 4—64, 113. Subd. 5.—64, 112.

Judgment of condemnation: Post, sec. 1253.

Practice, etc.: Ante, sec. 1246; post, secs. 1256, 1257.

Jury: Sec. 1256, *infra*.

Value, etc.: Post, sec. 1249.

§ 1249. The date with respect to which compensation shall be assessed, and the measure thereof. For the purpose of assessing compensation and damages, the right thereto shall be deemed to have accrued at the date of the summons, and its actual value, at that date, shall be the measure of compensation for all property to be actually taken, and the basis of damages to property not actually taken but injuriously affected, in all cases where such damages are allowed as provided in section twelve hundred and forty-eight. If an order be made letting the plaintiff into possession, as provided in section twelve hundred and fifty-four, the compensation and damages awarded shall draw lawful interest from the date of such order. No improvements put upon the property, subsequent to the date of the service of summons shall be included in the assessment of compensation or damages. En. March 11, 1872.

Cal. Rep. Cit. 61, 91; 68, 65; 74, 262; 83, 568; 124, 643; 124, 644; 124, 648.

§ 1250. New proceedings to cure defective title. If the title attempted to be acquired is found to be defective from any cause, the plaintiff may again institute proceedings to acquire the same, as in this title prescribed. En. March 11, 1872.

§ 1251. Payment of damages or deposit of bond therefor. The plaintiff must, within thirty days after final judg-

ment, pay the sum of money assessed; but may, at the time of or before payment, elect to build the fences and cattle-guards; and if he so elect, shall execute to the defendant a bond, with sureties to be approved by the court in double the assessed cost of the same, to build such fences and cattle-guards within eighteen months from the time the railroad is built on the land taken, and if such bond be given, need not pay the cost of such fences and cattle-guards. In an action on such bond, the plaintiff may recover reasonable attorney's fees. En. March 11, 1872.

Cal. Rep. Cit. 64, 112; 64, 113; 65, 294; 67, 63; 104, 27; 129, 407; 129, 408; 133, 7; 134, 416; 139, 132; 139, 133.

§ 1252. Damages, to whom paid. Payment may be made to the defendants entitled thereto, or the money may be deposited in court for the defendants, and be distributed to those entitled thereto. If the money be not so paid or deposited, the defendants may have execution as in civil cases; and if the money cannot be made on execution, the court, upon a showing to that effect, must set aside and annul the entire proceedings, and restore possession of the property to the defendant, if possession has been taken by the plaintiff. En. March 11, 1872.

Cal. Rep. Cit. 64, 112; 67, 63; 78, 81; 78, 82; 129, 407; 133, 7; 139, 133.

Payment, when to be made: Ante, sec. 1251; post, sec. 1254.

§ 1253. Final order of condemnation, what to contain. When filed, title vests. When payments have been made, and the bond given, if the plaintiff elects to give one, as required by the last two sections, the court must make a final order of condemnation, which must describe the property condemned, and the purposes of such condemnation. A copy of the order must be filed in the office of the recorder of the county, and thereupon the property described therein shall vest in the plaintiff for the purposes therein specified. En. March 11, 1872.

Cal. Rep. Cit. 64, 112; 67, 62; 78, 369; 132, 341; 133, 7; 134, 416; 141, 50.

§ 1254. Putting plaintiff in possession. At any time after trial and judgment entered or pending an appeal from the judgment to the supreme court, whenever the plaintiff

shall have paid into court, for the defendant, the full amount of the judgment, and such further sum as may be required by the court as a fund to pay any further damages and costs that may be recovered in said proceeding, as well as all damages that may be sustained by the defendant, if, for any cause, the property shall not be finally taken for public use, the superior court in which the proceeding was tried may, upon notice of not less than ten days, authorize the plaintiff, if already in possession, to continue therein, and if not, then to take possession of and use the property during the pendency of and until the final conclusion of the litigation, and may, if necessary, stay all actions and proceedings against the plaintiff on account thereof. The defendant, who is entitled to the money paid into court for him upon any judgment, shall be entitled to demand and receive the same at any time thereafter upon obtaining an order therefor from the court. It shall be the duty of the court, or a judge thereof, upon application being made by such defendant, to order and direct that the money so paid into court for him be delivered to him upon his filing a satisfaction of the judgment, or upon his filing a receipt therefor, and an abandonment of all defenses to the action or proceeding, except as to the amount of damages that he may be entitled to in the event that a new trial shall be granted. A payment to a defendant, as aforesaid, shall be held to be an abandonment by such defendant of all defenses interposed by him, excepting his claim for greater compensation. In ascertaining the amount to be paid into court, the court shall take care that the same be sufficient and adequate. The payment of the money into court, as hereinbefore provided for, shall not discharge the plaintiff from liability to keep the said fund full and without diminution; but such money shall be and remain, as to all accidents, defalcations, or other contingencies (as between the parties to the proceedings), at the risk of the plaintiff, and shall so remain until the amount of the compensation or damages is finally settled by judicial determination, and until the court awards the money, or such part thereof as shall be determined upon, to the defendant, and until he is authorized or required by rule of court to take it. If, for any reason, the money shall at any time be lost, or otherwise abstracted or withdrawn, through no fault of the defendant, the court shall require the plaintiff to make and keep the sum good at all times until the litigation is finally brought to an end, and until paid over or made payable to the defendant by order of court, as above

provided, and until such time or times the county clerk shall be deemed to be the custodian of the money, and shall be liable to the plaintiff upon his official bond for the same, or any part thereof, in case it be for any reason lost or otherwise abstracted or withdrawn. The court may order the money to be deposited in the state treasury, and in such case it shall be the duty of the state treasurer to receive all such moneys, duly receipt for, and to safely keep the same in a special fund, to be entered on his books as a condemnation fund for such purpose, and for such duty he shall be liable to the plaintiff upon his official bond. The state treasurer shall pay out such money so deposited in such manner and at such times as the court or a judge thereof may, by order or decree, direct. In all cases where a new trial has been granted upon the application of the defendant, and he has failed upon such trial to obtain greater compensation than was allowed him upon the first trial, the costs of such new trial shall be taxed against him. En. March 11, 1872. Am'd. 1877-8, 108; 1880, 119; 1897, 186; 1903, 109.

Cal. Rep. Cit. 47, 70; 47, 519; 47, 520; 47, 523; 49, 241; 53, 211; 65, 376; 77, 29; 78, 81; 78, 444; 78, 448; 83, 567; 95, 221; 95, 223; 103, 235; 104, 22; 104, 24; 133, 532; 137, 575; 137, 576; 137, 578; 138, 544; 141, 48.

Interest: Ante, sec. 1249.

§ 1255. Costs may be allowed, apportionment thereof. Costs may be allowed or not, and if allowed, may be apportioned between the parties on the same or adverse sides, in the discretion of the court. En. March 11, 1872.

Cal. Rep. Cit. 88, 67; 88, 68; 98, 262; 104, 22; 104, 23; 125, 106; 133, 7; 139, 136.

§ 1256. Rules of practice. Except as otherwise provided in this title, the provisions of part two of this code are applicable to and constitute the rules of practice in the proceedings mentioned in this title. En. March 11, 1872.

Cal. Rep. Cit. 50, 506; 67, 62; 74, 265; 134, 377; 138, 582.

Part two: Ante, secs. 307 et seq.

§ 1257. New trials and appeals. The provisions of part two of this code, relative to new trials and appeals, except

in so far as they are inconsistent with the provisions of this title, apply to the proceedings mentioned in this title; provided, that upon the payment of the sum of money assessed, and upon the execution of the bond to build the fences and cattle-guards, as provided in section twelve hundred and fifty-one, the plaintiff shall be entitled to enter into, improve, and hold possession of the property sought to be condemned (if not already in possession) as provided in section twelve hundred and fifty-four, and devote the same to the public use in question; and no motion for new trial or appeal shall, after such payment and filing of such bond as aforesaid, in any manner retard the contemplated improvement. Any money which shall have been deposited, as provided in section twelve hundred and fifty-four, may be applied to the payment of the money assessed and the remainder, if any there be, shall be returned to the plaintiff. En. March 11, 1872. Am'd. 1877-8, 109; 1897, 188; 1903, 110.

Cal. Rep. Cit. 59, 90; 104, 27.

§ 1258. When title takes effect, and construction of. With relation to the acts passed at the present session of the legislature, this title must be construed in the same manner as if this code had been passed on the last day of this session, and from and after the time this code takes effect, all laws of this state in relation to the taking of private property for public uses are abolished, and all proceedings had in the exercise of the powers of eminent domain must conform to the provisions of this title. En. March 11, 1872.

§ 1259. When title takes effect. Title seven of part three of the Code of Civil Procedure of the state of California (this title) shall be in force and effect from and after the fourth day of April, one thousand eight hundred and seventy-two. En. March 11, 1872.

§ 1260. Construction. From and after the time this title takes effect, it must be construed in the same manner as it would be were sections four and seventeen of this code in force and effect. En. March 11, 1872.

§ 1261. Pending proceedings not affected. No proceeding to enforce the right of eminent domain commenced before this title takes effect is affected by the provisions of this title. En. March 11, 1872.

§ 1262. **Rules of practice.** Until the first day of January, one thousand eight hundred and seventy-three, at twelve o'clock noon, the provisions of sections twelve hundred and fifty-six and twelve hundred and fifty-seven of this title are suspended, and until then, except as otherwise provided in this title, the rules of pleading and practice in civil actions now in force in this state are applicable to the proceedings mentioned in this title, and constitute the rules of pleading and practice therein. En. March 11, 1872.

§ 1263. **Exceptions.** Nothing in this code must be construed to abrogate or repeal any statute providing for the taking of property in any city or town for street purposes. En. March 11, 1872.

Cal. Rep. Cit. 66, 506; 79, 161; 87, 231; 91, 247; 91, 248.

§ 1264. **Preference of proceedings over other civil actions.** In all actions brought under the provisions of this title, to enforce the right of eminent domain, all courts wherein such actions are or may hereafter be pending, shall give such actions preference over all other civil actions therein, in the matter of setting the same for hearing or trial, and in hearing the same, to the end that all such actions shall be quickly heard and determined. En. Stats. 1903, 165.

TITLE VIII.

OF ESCHATED ESTATES.

§ 1269. Manner of commencing proceedings relative to escheated estates.

§ 1270. Receiver of rents and profits may be appointed.

§ 1271. Appearance, pleadings, and trial.

§ 1272. Proceedings by persons claiming escheated estates.

§ 1269. Manner of commencing proceedings relative to escheated estates. When the attorney general is informed that any real estate has escheated to this state, he must file an information in behalf of the state in the superior court of the county in which such estate, or any part thereof, is situated, setting forth a description of the estate, the name of the person last seised, the name of the occupant and person claiming such estate, if known, and the facts and circumstances in consequence of which the estate is claimed to have escheated, with an allegation that, by reason thereof, the state of California has right by law to such estate. Upon such information, a summons must issue to such person, requiring him to appear and answer the information within the time allowed by law in civil actions; and the court must make an order setting forth briefly the contents of the information, and requiring all persons interested in the estate to appear and show cause, if any they have, within forty days from the date of the order, why the same should not vest in this state; which order must be published for at least one month from the date thereof, in a newspaper published in the county, if one be published therein, and in case no newspaper is published in the county, in some other newspaper in this state. En. March 11, 1872. Am'd. 1880, 110.

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Cal. Rep. Cit. 65, 595; 67, 381; 67, 385; 110, 410; 143, 140; 143, 141; 143, 197; 143, 198; 143, 201; 143, 202; 143, 205; 143, 206; 143, 207.

Property, when escheats: Pol. Code, sec. 41.

Duty of attorney general: Pol. Code, sec. 474.

Unclaimed realty of nonresident aliens escheats to state: Civ. Code, sec. 672.

§ 1270. Receiver of rents and profits may be appointed. The court, upon the information being filed, and upon the application of the attorney general, either before or after

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answer, upon notice to the party claiming such estate if known, may, upon sufficient cause therefor being shown, appoint a receiver to take charge and receive the rents and profits of the same until the title to such real estate is finally settled. En. March 11, 1872.

Cal. Rep. Cit. 143, 140; 143, 141; 143, 197; 143, 198; 143, 201; 143, 202; 143, 205; 143, 206; 143, 207.

Appointment of receiver: See generally, ante, secs. 564-569.

§ 1271. Appearance, pleadings, and trial. All persons named in the information may appear and answer, and may traverse or deny the facts stated in the information, the title of the state to lands and tenements therein mentioned, at any time before the time for answering expires, and any other person claiming an interest in such estate may appear and be made a defendant, and by motion for that purpose in open court within the time allowed for answering; and if no person appears and answers within the time, then judgment must be rendered, that the state be seised of the lands and tenements in such information claimed. But if any person appear and deny the title set up by the state, or traverse any material fact set forth in the information, the issue of fact must be tried as issues of facts are tried in civil actions. If, after the issues are tried, it appears from the facts found or admitted that the state has good title to the land and tenements in the information mentioned, or any part thereof, judgment must be rendered that the state be seised thereof, and recover costs of suit against the defendants. In any judgment rendered, or that has heretofore been rendered by any court of competent jurisdiction, escheating real property to the state, on motion of the attorney general, the court shall make an order that said real property be sold by the sheriff of the county where the same is situate, at public sale, for gold coin, after giving such notice of the time and place of sale as may be prescribed by the court in the said order; that the sheriff shall, within five days after such sale, make a report thereof to the court, and upon the hearing said report, the court may examine the said report and witnesses in relation to the same, and if the proceedings were unfair, or the sum bid disproportionate to the value, and if it appear that a sum exceeding such bid at least ten per cent, exclusive of the expense of a new sale, may be obtained, the court may vacate the sale, and

direct another sale to be had, of which notice must be given, and the sale in all respects conducted as if no previous sale had taken place. If an offer of ten per cent more in amount than that named in the report be made to the court in writing, by a responsible person, the court may, in its discretion, accept such offer, and confirm the sale to such person, or order a new sale. If it appears to the court that the sale was legally made, and fairly conducted, and that the sum bid is not disproportionate to the value of the property sold, and that a greater sum than ten per cent, exclusive of the expense of a new sale, cannot be obtained, or if the increased bid above mentioned be made and accepted by the court, the court must make an order confirming the sale, and directing the sheriff, in the name of the state, to execute to purchaser or purchasers a conveyance of said property sold; and said conveyance shall vest in the purchaser or purchasers all the right and title of the state therein, and the sheriff shall, out of the proceeds of such sale, pay the cost of said proceedings incurred on behalf of the state, including the expenses of making such sale, and also an attorney's fee, if additional counsel was employed in said proceedings, to be fixed by the court, not exceeding ten per cent on the amount of such sale, and the residue thereof shall be paid by said sheriff into the state treasury. En. March 11, 1872. Am'd. 1881, 11.

Proceedings, appearance: Ante, sec. 1014; answer: Ante, sec. 437; judgment: Ante, secs. 585, 664; trial: Ante, secs. 600-645; issue of fact: Ante, secs. 590, 592; costs: Ante, secs. 1021 et seq.

§ 1272. Proceedings by persons claiming escheated estates. Within twenty years after judgment in any proceeding had under this title, a person not a party or privy to such proceeding may file a petition in the superior court of the county of Sacramento, showing his claim or right to the property, or the proceeds thereof. A copy of such petition must be served on the attorney general at least twenty days before the hearing of the petition, who must answer the same; and the court thereupon must try the issue as issues are tried in civil actions, and if it be determined that such person is entitled to the property, or the proceeds thereof, it must order the property, if it has not been sold, to be delivered to him, or if it has been sold and the proceeds paid into the state treasury, then it must order the controller to draw his warrant on the treasury

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for the payment of the same, but without interest or cost to the state, a copy of which order, under the seal of the court, shall be a sufficient voucher for drawing such warrant. All persons who fail to appear and file their petitions within the time limited are forever barred, saving, however, to infants, married women, and persons of unsound mind, or persons beyond the limits of the United States, the right to appear and file their petitions at any time within the time limited, or five years after their respective disabilities cease. En. March 11, 1872. Am'd. 1880, 110.

Cal. Rep. Cit. 65, 595; 67, 381; 67, 383; 67, 386; 70, 157; 143, 140; 143, 141; 143, 197; 143, 198; 143, 201; 143, 202; 143, 205; 143, 206; 143, 207.

TITLE IX.

OF CHANGE OF NAMES.

§ 1275. Jurisdiction.

§ 1276. Application for change of name, how made.

§ 1277. Order to show cause; publication; proof of publication.

§ 1278. Hearing of application and remonstrance; corporations; change of name.

§ 1279. Return by county clerk.

§ 1275. Jurisdiction. Applications for change of names must be heard and determined by the superior courts. En. March 11, 1872. Am'd. 1880, 117.

Cal. Rep. Cit. 123, 526; 123, 624.

§ 1276. Application for change of name, how made. All applications for change of names must be made to the superior court of the county where the person whose name is proposed to be changed resides, by petition, signed by such person; and if such person is under twenty-one years of age, if a male, and under the age of eighteen years of age, if a female, by one of the parents, if living, or if both be dead, then by the guardian; and if there be no guardian, then by some near relative or friend. The petition must specify the place of birth and residence of such person, his or her present name, the name proposed, and the reason for such change of name, and must, if the father of such person be not living, name, as far as known to the petitioner, the near relatives of such person, and their place of residence. Any religious, benevolent, literary, scientific, or other corporation, or any corporation bearing or having for its name, or using or being known by the name of any benevolent or charitable order or society, may, by

petition, apply to the superior court of the county in which its articles of incorporation were originally filed, or in which the property of such incorporation is situated, for a change of its corporate name. Such petition must be signed by a majority of the directors or trustees of the corporation, and must specify the date of the formation of the corporation, its present name, the name proposed, and the reason for such change of name. Upon filing such petition on behalf of such corporation, the same proceedings shall be had, as upon applications for changes of names of natural persons, and no banking corporation hereafter organized shall adopt or use the name of any friendly association. En. March 11, 1872. Am'd. 1877-8, 110; 1880, 117; 1885, 112.

Cal. Rep. Cit. 123, 526; 123, 530.

§ 1277. Order to show cause; publication; proof of publication. Upon the filing of the said petition the court shall thereupon make an order reciting the filing of the application, the name of the person or corporation by whom it is filed and the name proposed, and directing all persons interested in said matter to appear before the court, at a time and place specified, not less than four or more than eight weeks from the time of making such order, to show cause why the application for change of name should not be granted. A copy of the order to show cause must be published for four successive weeks in some newspaper of general circulation to be designated in the order, printed in the county, if a newspaper be printed therein, or, if no newspaper be printed in the county, a copy of such order to show cause shall be posted by the clerk of the court in three of the most public places in the county in which the court is held, for a like period. Proof must be made to the satisfaction of the court, of such publication, or posting, at the time of the hearing of the application. En. March 11, 1872. Am'd. 1905, 40.

Cal. Rep. Cit. 123, 526.

§ 1278. Hearing of application and remonstrance. Corporations, change of name. Such application must be heard at such time as the court may appoint, and objections may be filed by any person who can, in such objections, show to the court good reason against such change of name. On the hearing, the court may examine on oath any of the petitioners, remonstrants, or other persons, touching the application, and may make an order changing the name,

or dismissing the application, as to the court may seem right and proper. Provided, that if the applicant for a change of name be a corporation, such applicant shall file in court at the time of hearing the application, the certificate of the secretary of state that the name desired to be used by the applicant, is not the corporate name of any corporation existing at said time, and that said name does not so closely resemble the name of any such existing corporation as will tend to deceive. En. March 11, 1872. Am'd. 1880, 117; 1905, 99.

Cal. Rep. Cit. 123, 526.

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§ 1279. Return by county clerk. Each county clerk shall, annually, in the month of January, make a return to the office of the secretary of state of all changes of names made in the superior court of his county under this title. Such return shall show the date of the decree of the court, original name, name decreed, and residence. Such returns shall be published in a tabular form with the statutes first published thereafter. En. Stats. 1873-4, 413. Am'd. 1880, 118.

Cal. Rep. Cit. 123, 526.

TITLE X.

OF ARBITRATIONS.

- § 1281. What may be submitted to arbitration, and when.
- § 1282. Submission to arbitration to be in writing.
- § 1283. Submission may be entered as an order of the court. Revocation.
- § 1284. Powers of arbitrators.
- § 1285. Majority of arbitrators may determine any question. They must be sworn.
- § 1286. Award to be in writing. When judgment to be entered.
- § 1287. Award may be vacated in certain cases.
- § 1288. Court may, on motion, modify or correct the award.
- § 1289. Decision, on motion, subject to appeal, but not the judgment entered before motion.
- § 1290. If submission be revoked and an action brought, what to be recovered.

§ 1281. What may be submitted to arbitration, and when. Persons capable of contracting may submit to arbitration any controversy which might be the subject of a civil action between them, except a question of title to real property in fee or for life. This qualification does not include questions relating merely to the partition or boundaries of real property. En. March 11, 1872.

Cal. Rep. Cit. 52, 164; 96, 619.

Prac. Act, sec. 380. En. April 29, 1851.

Cal. Rep. Cit. 30, 221; 42, 482; 43, 394.

§ 1282. Submission to arbitration to be in writing. The submission to arbitration must be in writing, and may be to one or more persons. En. March 11, 1872.

Prac. Act, sec. 381. En. April 29, 1851.

Cal. Rep. Cit. 30, 221.

§ 1283. Submission may be entered as an order of the court. Revocation. It may be stipulated in the submission that it be entered as an order of the superior court, for which purpose it must be filed with the clerk of the county where the parties, or one of them, reside. The clerk must thereupon enter in his register of actions a note of the submission, with the names of the parties, the names of the arbitrators, the date of the submission, when filed, and the time limited by the submission, if any, within which the award must be made. When so entered, the submission cannot be revoked without the consent of both parties. The arbitrators may be compelled by the court to make an award, and the award may be enforced by the court in the same manner as a judgment. If the submission is not made an order of the court, it may be revoked at any time before the award is made. En. March 11, 1872. Am'd. 1880, 74.

Cal. Rep. Cit. 65, 505; 76, 380; 82, 46; 99, 208; 99, 209; 99, 210.

Prac. Act, sec. 382. En. April 29, 1851.

Cal. Rep. Cit. 30, 222; 42, 482; 43, 394.

Register of actions generally: Ante, sec. 1052.

§ 1284. Powers of arbitrators. Arbitrators have power to appoint a time and place for hearing, to adjourn from time to time, to administer oaths to witnesses, to hear the allegations and evidence of the parties, and to make an award thereon. En. March 11, 1872.

Prac. Act, sec. 383. En. April 29, 1851.

§ 1285. Majority of arbitrators may determine any question. They must be sworn. All the arbitrators must meet and act together during the investigation; but when met, a majority may determine any question. Before acting,

they must be sworn before an officer authorized to administer oaths, faithfully and fairly to hear and examine the allegations and evidence of the parties in relation to the matters in controversy, and to make a just award according to their understanding. En. March 11, 1872.

Cal. Rep. Cit. 96, 620; 99, 210.

Prac. Act, sec. 384. En. April 29, 1851.

Majority acting: Ante, sec. 1053.

§ 1286. Award to be in writing. When judgment to be entered. The award must be in writing, signed by the arbitrators, or a majority of them, and delivered to the parties. When the submission is made an order of the court, the award must be filed with the clerk, and a note thereof made in his register. After the expiration of five days from the filing of the award, upon the application of a party, and on filing an affidavit, showing that notice of filing the award has been served on the adverse party or his attorney, at least four days prior to such application, and that no order staying the entry of judgment has been served, the award must be entered by the clerk in the judgment book, and thereupon has the effect of a judgment. En March 11, 1872.

Cal. Rep. Cit. 74, 108.

Prac. Act, sec. 385. En. April 29, 1851.

Cal. Rep. Cit. 14, 394; 14, 395; 30, 222; 31, 129.

§ 1287. Award may be vacated in certain cases. The court, on motion, may vacate the award upon either of the following grounds, and may order a new hearing before the same arbitrators, or not, in its discretion:

1. That it was procured by corruption or fraud;
2. That the arbitrators were guilty of misconduct, or committed gross error in refusing, on cause shown, to postpone the hearing, or in refusing to hear pertinent evidence, or otherwise acted improperly, in a manner by which the rights of the party were prejudiced;
3. That the arbitrators exceeded their powers in making their award; or that they refused, or improperly omitted, to consider a part of the matters submitted to them; or that the award is indefinite, or cannot be performed. En. March 11, 1872.

Cal. Rep. Cit. 96, 620; 128, 282. Subd. 2—140, 208; Subd. 3—140, 208.

Prac. Act, sec. 386. En. April 29, 1851.

Cal. Rep. Cit. 38, 287.

Referee's reports: Ante, secs. 643-645.

§ 1288. Court may, on motion, modify or correct the award. The court may, on motion, modify or correct the award, where it appears:

1. That there was a miscalculation in figures upon which it was made, or that there is a mistake in the description of some person or property therein;

2. When a part of the award is upon matters not submitted, which part can be separated from other parts, and does not affect the decision on the matters submitted;

3. When the award, though imperfect in form, could have been amended if it had been a verdict, or the imperfection disregarded. En. March 11, 1872.

Cal. Rep. Cit. 96, 620; 128, 282.

Prac. Act, sec. 387. En. April 29, 1851.

Cal. Rep. Cit. 38, 287.

§ 1289. Decision, on motion, subject to appeal, but not the judgment entered before motion. The decision upon the motion is subject to appeal in the same manner as an order which is subject to appeal in a civil action; but the judgment entered before a motion made cannot be subject to appeal. En. March 11, 1872.

Cal. Rep. Cit. 128, 281; 140, 211.

Prac. Act, sec. 388. En. April 29, 1851.

Cal. Rep. Cit. 38, 286; 42, 128.

Motion to vacate or modify award: Ante, secs. 1287, 1288.

Appealable orders: Ante, sec. 939.

§ 1290. If submission be revoked and an action brought, what to be recovered. If a submission to arbitration be revoked, and an action be brought therefor, the amount to be recovered can only be the costs and damages sustained in preparing for and attending the arbitration. En. March 11, 1872.

Cal. Rep. Cit. 96, 619.

Prac. Act, sec. 389. En. April 29, 1851.

TITLE XI.

OF PROCEEDINGS IN PROBATE COURTS.

- Chapter I. Of Jurisdiction, §§ 1294-1295.
- II. Of the Probate of Wills, §§ 1298-1346.
 - III. Of Executors and Administrators, Their Letters, Bonds, Removals, and Suspensions, §§ 1348-1440.
 - IV. Of the Inventory and Collection of the Effects of Decedents, §§ 1443-1461.
 - V. Of the Provisions for Support of Family, and of the Homestead, §§ 1464-1486.
 - VI. Of Claims Against the Estate, §§ 1490-1514.
 - VII. Of Sales and Conveyance of Property of Decedents, §§ 1516-1579.
 - VIII. Of the Powers and Duties of Executors and Administrators, and of the Management of Estates, §§ 1581-1591.
 - IX. Of the Conveyance of Real Estate by Executors and Administrators in Certain Cases, §§ 1597-1607.
 - X. Of Accounts Rendered by Executors and Administrators, and of the Payment of Debts, §§ 1612-1653.
 - XI. Of the Partition, Distribution and Final Settlement of Estates, §§ 1658-1703½.
 - XII. Of Orders, Decrees, Process, Minutes, Records, Trials, and Appeals, §§ 1704-1723.
 - XIII. Of Public Administrator, §§ 1726-1744.
 - XIV. Of Guardian and Ward, §§ 1747-1810.

CHAPTER I.

OF JURISDICTION.

- § 1294. Jurisdiction of probate court over the estate, when exercised.
 § 1295. When jurisdiction decided by first application.

§ 1294. Jurisdiction of probate court over the estate, when exercised. Wills must be proved, and letters testamentary or of administration granted:

1. In the county of which the decedent was a resident at the time of his death, in whatever place he may have died;

2. In the county in which the decedent may have died, leaving estate therein, he not being a resident of the state;

3. In the county in which any part of the estate may be, the decedent having died out of the state, and not resident thereof at the time of his death;

4. In the county in which any part of the estate may be, the decedent not being a resident of the state, and not leaving estate in the county in which he died;

5. In all other cases, in the county where application for letters is first made. En. March 11, 1872.

Cal. Rep. Cit. 70, 407; 70, 411; 71, 522; 109, 253.

Prob. Act, sec. 2. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 628.

Probate matters, jurisdiction of superior courts in: Ante, sec. 76, subd. 4.

§ 1295. When jurisdiction decided by first application. When the estate of the decedent is in more than one county, he having died out of the state, and not having been a resident thereof at the time of his death, or being such nonresident, and dying within the state, and not leaving estate in the county where he died, the superior court of that county in which application is first made, for letters testamentary or of administration, has exclusive jurisdiction of the settlement of the estate. En. March 11, 1872. Am'd. 1880, 77.

Prob. Act, sec. 3. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 628; 1864, 367.

CHAPTER II.

OF THE PROBATE OF WILLS.

- Article I.** Petition, Notice, and Proof, §§ 1298-1309.
II. Contesting Probate of Will, §§ 1312-1318.
III. Probate of Foreign Wills, §§ 1322-1324.
IV. Contesting Will after Probate, §§ 1327-1333.
V. Probate of Lost or Destroyed Will, §§ 1338-1341.
VI. Probate of Nuncupative Wills, §§ 1344-1346.

ARTICLE I.

PETITION, NOTICE, AND PROOF.

- § 1298. Custodian of will to deliver same, to whom.
 § 1299. Who may petition for probate of will.
 § 1300. Contents of petition.
 § 1301. When executor forfeits right to letters.
 § 1302. Possession of will by third person. Production of.
 § 1303. Notice of petition for probate, how given.
 § 1304. Heirs and named executors to be notified, how.
 § 1305. Order to enforce production of wills or attendance of witnesses.
 § 1306. Hearing proof of will after proof of service of notice.
 § 1307. Who may appear and contest the will.
 § 1308. Probate, when no contest.
 § 1309. Olographic wills.

§ 1298. **Custodian of will to deliver same, to whom.** Every custodian of a will, within thirty days after receipt of information that the maker thereof is dead, must deliver the same to the superior court having jurisdiction of the estate, or to the executor named therein. A failure to comply with the provisions of this section makes the person failing responsible for all damages sustained by anyone injured thereby. En. March 11, 1872. Am'd. 1880, 77.

Prob. Act, sec. 4. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 22, 397.

Prob. Act, sec. 7. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

§ 1299. **Who may petition for probate of will.** Any executor, devisee, or legatee named in any will, or any other person interested in the estate, may, at any time after the death of the testator, petition the court having

jurisdiction to have the will proved, whether the same be in writing, in his possession or not, or is lost or destroyed, or beyond the jurisdiction of the state, or a nuncupative will. En. March 11, 1872.

Cal. Rep. Cit. 93, 620; 120, 451; 135, 677; 145, 87.

Prob. Act, sec. 5. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 22, 66; 22, 397.

Prob. Act, secs. 89. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

§ 1300. Contents of petition. A petition for the probate of a will must show:

1. The jurisdictional facts.
2. Whether the person named as executor consents to act, or renounces his right to letters testamentary.
3. The names, ages, and residence of the heirs and devisees of the decedent, so far as known to the petitioner.
4. The probable value and character of the property of the estate.
5. The name of the person for whom letters testamentary are prayed.

No defect of form, or in the statement of jurisdictional facts actually existing, shall make void the probate of a will. En. March 11, 1872. Am'd. 1873-4, 356.

Cal. Rep. Cit. 70, 142; 93, 620.

Prob. Act, sec. 6. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 629.

Cal. Rep. Cit. 22, 66; 22, 397.

§ 1301. When executor forfeits right to letters. If the person named in a will as executor, for thirty days after he has knowledge of the death of the testator, and that he is named as executor, fails to petition the proper court for the probate of the will, and that letters testamentary be issued to him, he may be held to have renounced his right to letters, and the court may appoint any other competent person administrator, unless good cause for delay is shown. En. March 11, 1872.

Cal. Rep. Cit. 118, 280.

§ 1302. Possession of will by third person. Production of. If it is alleged in any petition that any will is in the

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possession of a third person, and the court is satisfied that the allegation is correct, an order must be issued and served upon the person having possession of the will, requiring him to produce it at a time named in the order. If he has possession of the will, and neglects or refuses to produce it in obedience to the order, he may, by warrant from the court, be committed to the jail of the county, and be kept in close confinement until he produces it. En. March 11, 1872.

Prob. Act, sec. 10. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Prob. Act, sec. 11. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Probate orders and citations: Post, secs. 1704-1711.
Imprisonment until order obeyed: Ante, sec. 1219.

§ 1303. Notice of petition for probate, how given. When the petition is filed and the will produced, the clerk of the court must set the petition for hearing by the court upon some day not less than ten nor more than thirty days from the production of the will. Notice of the hearing shall be given by such clerk by publishing the same in a newspaper of the county; if there is none, then by three written or printed notices posted at three of the most public places in the county. If the notice is published in a weekly newspaper, it must appear therein on at least three different days of publication; and if in a newspaper published oftener than once a week, it shall be so published that there must be at least ten days from the first to the last day of publication, both the first and the last day being included. If the notice is by posting, it must be given at least ten days before the hearing. En. March 11, 1872. Amd. 1880, 77; 1881, 23.

Cal. Rep. Cit. 93, 620; 101, 668; 109, 28; 129, 152; 136, 595; 141, 332.

Prob. Act, sec. 13. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 629; 1866, 765.

Cal. Rep. Cit. 22, 66; 22, 397; 39, 554.

Prob. Act, sec. 16. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 629.

Publication of notice: Sec. 1705.

Affidavit of publication: Post, secs. 2010, 2011.

§ 1304. Heirs and named executors to be notified, how. Copies of the notice of the time appointed for the probate of the will must be addressed to the heirs of the testator resident in the state, at their places of residence, if known to the petitioner, and deposited in the postoffice, with the postage thereon prepaid, at least ten days before the hearing. If their places of residence be not known, the copies of notice may be addressed to them, and deposited in the postoffice at the county seat of the county where the proceedings are pending. A copy of the same notice must in like manner be mailed to the person named as executor, if he be not the petitioner; also, to any person named as coexecutor not petitioning, if their places of residence be known. Proof of mailing the copies of the notice must be made at the hearing. Personal service of copies of the notice at least ten days before the day of hearing is equivalent to mailing. En. March 11, 1872. Am'd. 1873-4, 357.

Cal. Rep. Cit. 101, 668; 109, 28; 120, 351; 120, 430; 136, 595.

Prob. Act, sec. 14. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 46, 316; 91, 634.

Prob. Act, sec. 15. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

§ 1305. Order to enforce production of wills or attendance of witnesses, A judge of the superior court may at any time make and issue all necessary orders and writs to enforce the production of wills and the attendance of witnesses. En. March 11, 1872. Am'd. 1880, 78; 1891, 427.

Prob. Act, sec. 12. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 629.

Probate powers at chambers: Ante, sec. 166.

Probate orders and processes: Post, secs. 1704 et seq.

§ 1306. Hearing proof of will after proof of service of notice. At the time appointed for the hearing, or the time to which the hearing may have been postponed, the court unless the parties appear, must require proof that the notice has been given, which being made, the court must hear testimony in proof of the will. En. March 11, 1872. Am'd. 1873-4, 357.

Cal. Rep. Cit. 49, 604; 101, 669; 113, 376.

Prob. Act, sec. 17. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 629.

Testimony in proof of the will: Post, secs. 1308, 1309, 1315, 1316.

§ 1307. Who may appear and contest the will. Any person interested may appear and contest the will. Devisees, legatees, or heirs of an estate may contest the will through their guardians, or attorneys appointed by themselves or by the court for that purpose; but a contest made by an attorney appointed by the court does not bar a contest after probate by the party so represented, if commenced within the time provided in article four of this chapter; nor does the nonappointment of an attorney by the court of itself invalidate the probate of the will. En. March 11, 1872. Am'd. 1873-4, 357.

Cal. Rep. Cit. 54, 557; 74, 59; 98, 105; 101, 612; 122, 163; 140, 433.

Prob. Act, sec. 18. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 630.

Contest: Secs. 1312 et seq.

Guardians: Secs. 372, 373, 1747-1809.

Attorney appointed by the court: Sec. 1718.

§ 1308. Probate of wills not contested. If no person appears to contest the probate of a will, the court may admit it to probate on the testimony of one of the subscribing witnesses only, if he testifies that the will was executed in all particulars as required by law, and that the testator was of sound mind at the time of its execution. If it appears at the time fixed for the hearing that none of the subscribing witnesses reside in the county, but that the deposition of one of them can be taken elsewhere, the court may direct it to be taken, and may authorize a photographic copy of the will to be made and to be presented to such witness on his examination, who may be asked the same questions with respect to it and the handwriting of himself, the testator, and the other witness, as would be pertinent and competent if the original will were present. If neither the attendance in court nor the deposition of any of the subscribing witnesses can be procured, the court may admit the will to probate upon the testimony of any other witness as provided in section thirteen hundred and seventeen. En. March 11, 1872. Am'd. 1905, 234.

Cal. Rep. Cit. 73, 566; 140, 432.

Prob. Act, sec. 19. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Admitting to probate, where contest: Ante, secs. 1314, 1317, 1318; conclusiveness of: Post, sec. 1908, subd. 1.

§ 1309. Olographic wills. An olographic will may be proved in the same manner that other private writings are proved. En. March 11, 1872.

Cal. Rep. Cit. 100, 207; 145, 85; 145, 409.

Private writings, how proved: Post, sec. 1940.

ARTICLE II.

CONTESTING PROBATE OF WILLS.

- § 1312. Contestant to file grounds of contest, and petitioner to reply.
- § 1313. How jury obtained and trial had.
- § 1314. Verdict of the jury. Judgment.
- § 1315. Witnesses, who and how many to be examined. Proof of handwriting, admitted, when.
- § 1316. Testimony reduced to writing for future evidence.
- § 1317. If proved, certificate to be attached.
- § 1318. Will and proof to be filed and recorded.

§ 1312. Contestant to file grounds of contest, and petitioner to reply. If anyone appears to contest the will, he must file written grounds of opposition to the probate thereof, and serve a copy on the petitioner and other residents of the county interested in the estate, any one or more of whom may demur thereto upon any of the grounds of demurrer provided for in part two, title six, chapter three, of this code. If the demurrer is sustained, the court must allow the contestant a reasonable time, not exceeding ten days, within which to amend his written opposition. If the demurrer is overruled, the petitioner and others interested may jointly or separately answer the contestant's grounds, traversing or otherwise obviating or avoiding the objections. Any issues of fact thus raised, involving:

1. The competency of the decedent to make a last will and testament;
2. The freedom of the decedent at the time of the execution of the will from duress, menace, fraud, or undue influence;
3. The due execution and attestation of the will by the decedent or subscribing witnesses; or,
4. Any other questions substantially affecting the validity of the will;

—Must, on request of either party in writing, (filed three days prior to the day set for the hearing), be tried by a jury. If no jury is demanded, the court must try and determine the issues joined. On the trial, the contestant is plaintiff and the petitioner is defendant. En. March 11, 1872.

Cal. Rep. Cit. 56, 324; 56, 325; 63, 37; 67, 445; 73, 566; 73, 567; 73, 569; 74, 205; 74, 206; 74, 207; 74, 209; 74, 355; 98, 105; 100, 249; 101, 612; 106, 495; 118, 661; 131, 474; 140, 129; 140, 420; 140, 421; 140, 427; 140, 428; 140, 429; 140, 438. Subd. 1—72, 132; 79, 316. Subd. 4—67, 445; 70, 142; 128, 62; 133, 136; 133, 585; 140, 419.

Prob. Act, sec. 20. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1855, 132; 1861, 630; 1868, 628.

Cal. Rep. Cit. 34, 688; 35, 510; 35, 511; 46, 247; 74, 207.

Contestant: Ante, sec. 1307.

Contest, after probate: Post, secs. 1327 et seq.; through attorney appointed by the court: Ante, sec. 1307.

Execution, witnesses to be called: Post, sec. 1315.

Grounds of demurrer: Ante, secs. 430-434.

Service, etc.: Ante, secs. 1010-1017.

§ 1313. How jury obtained and trial had. When a jury is demanded, the superior court may impanel a jury to try the case, in the manner provided for impaneling trial juries in courts of record, and the trial must be conducted in accordance with the provisions of part two, title eight, chapter four, of this code. A trial by the court must be conducted as provided in part two, title eight, chapter five, of this code. En. March 11, 1872. Am'd. 1880, 78.

Trial juries, in courts of record, summoning: Ante, secs. 225-228; impaneling: Ante, secs. 246, 247.

Conduct of trial: Ante, secs. 600-628.

Trial by the court: Ante, secs. 631-636.

Transfer of proceeding: Ante, secs. 397, 398; post, 1430-1433.

§ 1314. Verdict of the jury. Judgment. The jury, after hearing the case, must return a special verdict upon the issues submitted to them by the court, upon which the judgment of the court must be rendered, either admitting the will to probate or rejecting it. In either case, the proofs of the subscribing witnesses must be reduced to writing. If the will is admitted to probate, the judgment, will, and proofs must be recorded. En. March 11, 1872.

Cal. Rep. Cit. 74, 208; 74, 209; 74, 355; 118, 661; 131, 474.
Verdict, generally: Ante, secs. 624-628.
Proofs reduced to writing: Post, sec. 1316.

§ 1315. Witnesses, who and how many to be examined. Proof of handwriting, admitted, when. If the will is contested, all the subscribing witnesses who are present in the county, and who are of sound mind, must be produced and examined; and the death, absence, or insanity of any of them must be satisfactorily shown to the court. If none of the subscribing witnesses reside in the county at the time appointed for proving the will, the court may admit the testimony of other witnesses to prove the sanity of the testator and the execution of the will; and as evidence of the execution it may admit proof of the handwriting of the testator and of the subscribing witnesses, or any of them. En. March 11, 1872.

Cal. Rep. Cit. 58, 337; 121, 407; 121, 409; 140, 432.

Prob. Act, sec. 21. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Prob. Act, sec. 22. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Writings, proof of execution: Post, sec. 1940.

Witnesses, generally: Post, secs. 1878-1884; attendance of, procuring: Post, secs. 1985 et seq.

§ 1316. Testimony reduced to writing for future evidence. The testimony of each witness, reduced to writing and signed by him, shall be good evidence in any subsequent contests concerning the validity of the will, or the sufficiency of the proof thereof, if the witness be dead, or has permanently removed from this state. En. March 11, 1872.

Prob. Act, sec. 23. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 22, 69.

§ 1317. If proved, certificate to be attached. If the court is satisfied, upon the proof taken, or from the facts found by the jury, that the will was duly executed, and that the testator at the time of its execution was of sound and disposing mind, and not acting under duress, menace, fraud, or undue influence, a certificate of the proof and the facts found, signed by the judge, and attested by the seal of the court, must be attached to the will. En. March 11, 1872. Am'd. 1880, 78.

Cal. Rep. Cit. 73, 572; 140, 432.

Prob. Act, sec. 24. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1855, 132.

Cal. Rep. Cit. 22, 69.

Seal required: Ante, sec. 153, subd. 2.

§ 1318. Will and proof to be filed and recorded. The will and a certificate of the proof thereof, must be filed and recorded by the clerk, and the same, when so filed and recorded, shall constitute part of the record in the cause or proceeding. All testimony shall be filed by the clerk. En. March 11, 1872. Am'd. 1880, 61.

Cal. Rep. Cit. 56, 324.

Prob. Act, sec. 25. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 22, 69.

ARTICLE III.

PROBATE OF FOREIGN WILLS.

§ 1322. Wills proved in other states to be recorded when and where.

§ 1323. Proceedings on the production of a foreign will.

§ 1324. Hearing proofs of probate of foreign will.

§ 1322. Wills proved in other states to be recorded when and where. All wills duly proved and allowed in any other of the United States, or in any foreign county or state, may be allowed and recorded in the superior court of any county in which the testator shall have left any estate. En. March 11, 1872. Am'd. 1880, 78.

Cal. Rep. Cit. 86, 101; 86, 103; 100, 377; 120, 345; 132, 403; 141, 540.

Prob. Act, sec. 27. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1863, 37.

1323 § 1323. Proceedings on the production of a foreign will. Am'd. When a copy of the will and the probate thereof, duly 491 authenticated, shall be produced by the executor, or by any other person interested in the will, with a petition for letters, the same must be filed, and the court or judge must appoint a time for the hearing: notice whereof must be given as hereinbefore provided for an original petition for the probate of a will. En. March 11, 1872.

Cal. Rep. Cit. 86, 101; 86, 102; 100, 377; 120, 345; 120, 346; 124, 293; 141, 540.

Prob. Act, sec. 28. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 630; 1864, 367.

Cal. Rep. Cit. 39, 554.

Foreign executor, no extraterritorial authority: Post, sec. 1913.

Notice as for an original petition: Ante, secs. 1303 et seq. Attorney for absent heirs: Post, sec. 1718.

Petition, notice, etc.: Ante, secs. 1299-1318.

§ 1324. Hearing proofs of probate of foreign will. If, on the hearing, it appears upon the face of the record that the will has been proved, allowed, and admitted to probate in any other of the United States, or in any foreign country, and that it was executed according to the law of the place in which the same was made, or in which the testator was at the time domiciled, or in conformity with the laws of this state, it must be admitted to probate and have the same force and effect as a will first admitted to probate in this state, and letters testamentary or of administration issued thereon. En. March 11, 1872.

Cal. Rep. Cit. 86, 101; 86, 102; 100, 377; 120, 345; 132, 403; 141, 540.

Prob. Act, sec. 29. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 630; 1864, 368.

Letters testamentary or of administration: Post, secs. 1349-1362.

ARTICLE IV.

CONTESTING WILL AFTER PROBATE.

§ 1327. The probate may be contested within one year.

§ 1328. Citation to be issued to parties interested.

§ 1329. The hearing had on proof of service.

§ 1330. Petitions to revoke probate of will tried by jury or court. Judgment, what.

§ 1331. On revocation of probate, powers of executor, etc., cease, but not liable for acts in good faith.

§ 1332. Costs and expenses, by whom paid.

§ 1333. Probate, when conclusive. One year after removal of disability given to infants and others.

§ 1327. The probate may be contested within one year. When a will has been admitted to probate, any person interested may, at any time within one year after such probate, contest the same or the validity of the will. For

that purpose he must file in the court in which the will was proved, a petition in writing, containing his allegations against the validity of the will or against the sufficiency of the proof, and praying that the probate may be revoked. En. March 11, 1872.

Cal. Rep. Cit. 51, 569; 52, 95; 54, 557; 63, 6; 90, 623; 98, 204; 100, 250; 109, 28; 116, 446; 116, 450; 116, 643; 118, 661; 118, 662; 133, 136; 136, 594; 140, 437.

Prob. Act, sec. 30. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 20, 272; 34, 504.

Allegations against validity of will: Ante, sec. 1312.

Probate, conclusive: Ante, sec. 1333.

§1328 § 1326. Citation to be issued to parties interested. Am'd. Upon filing the petition, a citation must be issued to the p. 492 executors of the will, or to the administrators with the will annexed, and to all the legatees and devisees mentioned in the will, and heirs residing in the state, so far as known to the petitioner; or to their guardians, if any of them are minors; or to their personal representatives, if any of them are dead; requiring them to appear before the court on some day of a regular term, therein specified, to show cause why the probate of the will should not be revoked. En. March 11, 1872. Am'd. 1873-4, 358.

Cal. Rep. Cit. 63, 8; 103, 94; 116, 451; 116, 452.

Prob. Act, sec. 31. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 37, 426.

Citation: Post, secs. 1707-1711.

Guardians: Post, secs. 1722, 1747 et seq.

§1329 § 1329. The hearing had on proof of service. At the Am'd. time appointed for showing cause, or at any time to which p. 492 the hearing is postponed, personal service of the citations having been made upon any persons named therein, the court must proceed to try the issues of fact joined in the same manner as an original contest of a will. En. March 11, 1872.

Cal. Rep. Cit. 116, 447; 138, 440.

Prob. Act, sec. 32. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Proof of notice: Ante, sec. 1306.

Trial of the issues joined: Ante, sec. 1312.

§ 1330. Petitions to revoke probate of will tried by jury or court. Judgment, what. In all cases of petitions to revoke the probate of a will, wherein the original probate was granted without a contest, on written demand of either party, filed three days prior to the hearing, a trial by jury must be had as in cases of the contest of an original petition to admit a will to probate. If, upon hearing the proofs of the parties, the jury shall find, or if no jury is had, the court shall decide, that the will is for any reason invalid, or that it is not sufficiently proved to be the last will of the testator, the probate must be annulled and revoked. En. March 30, 1872.

Cal. Rep. Cit. 73, 557; 106, 495; 147, 194.

Prob. Act, sec. 33. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Jury, trial by: Ante, secs. 1313, 1314.

§ 1331. On revocation of probate, powers of executor, etc., cease, but not liable for acts in good faith. Upon the revocation being made, the powers of the executor or administrator with the will annexed must cease; but such executor or administrator shall not be liable for any act done in good faith previous to the revocation. En. March 11, 1872.

Cal. Rep. Cit. 65, 334; 73, 557.

Prob. Act, sec. 34. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Acts before revocation, valid: Post, sec. 1428.

§ 1332. Costs and expenses, by whom paid. The fees and expenses must be paid by the party contesting the validity or probate of the will, if the will in probate is confirmed. If the probate is revoked, the costs must be paid by the party who resisted the revocation, or out of the property of the decedent, as the court directs. En. March 11, 1872.

Cal. Rep. Cit. 93, 572; 112, 452; 112, 454; 120, 452.

Prob. Act, sec. 35. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 630.

Costs, generally: Ante, secs. 1021 et seq.

§ 1333. Probate, when conclusive. One year after removal of disability given to infants and others. If no person, within one year after the probate of a will, contest the same or the validity thereof, the probate of the will is conclusive; saving to infants and persons of unsound mind a like period of one year after their respective disabilities are removed. En. March 11, 1872. Am'd. 1873-4, 358.

Cal. Rep. Cit. 51, 569; 52, 95; 63, 6; 74, 385; 77, 314; 100, 250; 101, 670; 136, 594.

Prob. Act, sec. 36. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 20, 272.

Conclusiveness of probate: Post, sec. 1908, subd. 1; see, also, sec. 1327, ante.

ARTICLE V.

PROBATE OF LOST OR DESTROYED WILL.

§ 1333. Proof of lost or destroyed will to be taken.

§ 1339. Must have been in existence at time of death.

§ 1340. To be certified, recorded, and letters thereon granted.

§ 1341. Court to restrain injurious acts of executors or administrators during proceedings to prove lost will.

§ 1338. Proof of lost or destroyed will to be taken. Whenever any will is lost or destroyed, the superior court must take proof of the execution and validity thereof, and establish the same; notice to all persons interested being first given, as prescribed in regard to proofs of wills in other cases. All the testimony given must be reduced to writing, and signed by the witnesses. En. March 11, 1872. Am'd. 1880, 78.

Cal. Rep. Cit. 98, 97.

Prob. Act, sec. 37. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Notice to all persons interested: Ante, secs. 1303, 1304; by citation: Post, secs. 1707-1711; service of papers: Ante, secs. 1010 et seq.

§ 1339. Must have been in existence at time of death. No will shall be proved as a lost or destroyed will, unless the same is proved to have been in existence at the

time of the death of the testator, or is shown to have been fraudulently destroyed in the lifetime of the testator, nor unless its provisions are clearly and distinctly proved by at least two credible witnesses. En. March 11, 1872.

Cal. Rep. Cit. 57, 283; 66, 489; 66, 490; 66, 491; 98, 93; 98, 94; 98, 102; 134, 235; 134, 663.

Prob. Act, sec. 38. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

§ 1340. To be certified, recorded, and letters thereon granted. When a lost will is established, the provisions thereof must be distinctly stated and certified by the judge, under his hand and the seal of the court, and the certificate must be filed and recorded as other wills are filed and recorded, and letters testamentary or of administration, with the will annexed, must be issued thereon in the same manner as upon wills produced and duly proved. The testimony must be reduced to writing, signed, certified, and filed as in other cases, and shall have the same effect as evidence as provided in section one thousand three hundred and sixteen. En. March 11, 1872. Am'd. 1873-4, 358; 1880, 78.

Prob. Act, sec. 39. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Certificate: Ante, secs. 1317, 1318.

Letters testamentary, etc.: Post, secs. 1349-1362.

§ 1341. Court to restrain injurious acts of executors or administrators during proceedings to prove lost will. If before, or during the pendency of an application to prove a lost or destroyed will, letters of administration are granted on the estate of the testator, or letters testamentary of any previous will of the testator are granted, the court may restrain the administrators or executors so appointed from any acts or proceedings which would be injurious to the legatees or devisees claiming under the lost or destroyed will. En. March 11, 1872.

Prob. Act, sec. 40. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

ARTICLE VI.

PROBATE OF NUNCUPATIVE WILLS.

- § 1344. Nuncupative wills, when and how admitted to probate.
§ 1345. Additional requirements in probate of nuncupative wills.
§ 1346. Contests and appointments to conform to provisions as to other wills.

§ 1344. Nuncupative wills, when and how admitted to probate. Nuncupative wills may at any time, within six months after the testamentary words are spoken by the decedent, be admitted to probate, on petition and notice as provided in article one, chapter two, of this title. The petition, in addition to the jurisdictional facts, must allege that the testamentary words or the substance thereof were reduced to writing within thirty days after they were spoken, which writing must accompany the petition. En. March 11, 1872.

Nuncupative wills: Civ. Code, secs. 1288-1291.

Petition, notice and proof: Ante, secs. 1298-1309.

§ 1345. Additional requirements in probate or nuncupative wills. The superior court must not receive or entertain a petition for the probate of a nuncupative will until the lapse of ten days from the death of the testator, nor must such petition at any time be acted on until the testamentary words are, or their substance is, reduced to writing and filed with the petition, nor until the surviving husband or wife (if any), and all other persons resident in the state or county interested in the estate, are notified as hereinbefore provided. En. March 11, 1872. Am'd. 1880, 79.

§ 1346. Contests and appointments to conform to provisions as to other wills. Contests of the probate of nuncupative wills, and appointments of executors and administrators of the estate devised thereby, must be had, conducted, and made as hereinbefore provided in cases of the probate of written wills. En. March 11, 1872.

Probate contests: Ante, secs. 1312 et seq., 1327 et seq.

Contesting appointment of executors, etc.: Post, secs. 1351, 1374.

CHAPTER III.

OF EXECUTORS AND ADMINISTRATORS, THEIR LETTERS,
BONDS, REMOVALS, AND SUSPENSIONS.

- Article I. Letters Testamentary and of Administration, With the Will Annexed, How and to Whom Issued, §§ 1348-1356.
- II. Form of Letters, §§ 1360-1362.
- III. Letters of Administration, to Whom, and the Order in Which They are Granted, §§ 1365-1370.
- IV. Petition and Contest for Letters, and Action Thereon, §§ 1371-1379.
- V. Revocation of Letters and Proceedings Therefor, §§ 1383-1386.
- VI. Oaths and Bonds of Executors and Administrators, §§ 1387-1407.
- VII. Special Administrators and Their Powers and Duties, §§ 1411-1417.
- VIII. Wills Found After Letters of Administration Granted, §§ 1423-1429.
- IX. Disqualification of Judges and Transfers of Administrations, §§ 1430-1433.
- X. Removals and Suspensions in Certain Cases, §§ 1436-1440.

ARTICLE I.

LETTERS TESTAMENTARY AND OF ADMINISTRATION, WITH
THE WILL ANNEXED, HOW AND TO WHOM ISSUED.

- § 1348. Corporations as executors.
- § 1349. To whom letters on proved will to issue.
- § 1350. Who are incompetent as executors or administrators. Letters with will annexed to issue, when.
- § 1351. Interested parties may file objections.
- § 1352. Married woman may be executrix.
- § 1353. Executor of an executor.
- § 1354. Letters of administration where minor executor.
- § 1355. Acts of a portion of executors valid.
- § 1356. Authority of administrators with will annexed. Letters, how issued.

§ 1348. Corporations as executors. Corporations, authorized by their articles of incorporation to act as executor, administrator, guardian of estates, assignee, receiver, depository, or trustee, and having a paid-up capital of not less than two hundred and fifty thousand dollars, or which one hundred thousand dollars shall have been actually paid in in cash, may be appointed to act in such capacity in like manner as individuals. In all cases in which it is required that an executor, administrator, guardian, assignee, receiver, depository, or trustee, shall

qualify by taking and subscribing an oath, or in which an affidavit is required, it shall be a sufficient qualification by such corporation, if such oath shall be taken and subscribed, or such affidavit made, by the president or secretary or manager thereof; and such officer shall be liable for the failure of such corporation to perform any of the duties required by law to be performed by individuals acting in like capacity and subject to like penalties; and such corporation shall be liable for such failure to the full amount of its capital stock and upon the bond required upon its assuming the trusts provided for herein. En. Stats. 1887, 21.

Act allowing corporation to act as executor: See Civ. Code, Appendix, title Corporations.

§1349
Am'd.
p. 492 § 1349. To whom letters on proved will to issue. The court admitting a will to probate, after the same is proved and allowed, must issue letters thereon to the persons named therein as executors who are competent to discharge the trust, who must appear and qualify, unless objection is made as provided in section thirteen hundred and fifty-one. En. March 11, 1872.

Cal. Rep. Cit. 88, 308; 120, 346.

Prob. Act, sec. 41. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 22, 66.

Letters testamentary, form of: Post, sec. 1360.

Qualifications of executors: Post, secs. 1387-1407; powers before: Civ. Code, sec. 1373.

§1350
Am'd.
p. 492 § 1350. Who are incompetent as executors or administrators. Letters with will annexed to issue, when. No person is competent to serve as executor who, at the time the will is admitted to probate, is:

1. Under the age of majority.
2. Convicted of an infamous crime.

3. Adjudged by the court incompetent to execute the duties of the trust by reason of drunkenness, improvidence, or want of understanding or integrity.

If the sole executor or all the executors are incompetent, or renounce, or fail to apply for letters, or to appear and qualify, letters of administration, with the will annexed,

must be issued as designated and provided for the grant of letters in cases of intestacy. En. March 11, 1872. Am'd. 1877-8, 111.

Cal. Rep. Cit. 70, 344; 74, 340; 80, 383; 88, 307; 88, 308; 88, 312; 108, 488; 108, 489; 118, 279; 120, 343; 120, 346; 122, 381; 125, 307; 132, 403; 141, 541; 141, 542. Subd. 3—118, 278.

Prob. Act, sec. 42. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 631.

Cal. Rep. Cit. 32, 441.

Incompetent to serve as executors, minor: Post, sec. 1354.

Some of executors unable to act: Post, sec. 1354.

Marriage, as affecting competency: Post, sec. 1352.

Letters of administration with will annexed: Post, sec. 1350. Enact. p. 493.

§ 1351. Interested parties may file objections. Any person interested in a will may file objections in writing, to granting letters testamentary to the persons named as executors, or any of them; and the objections must be heard and determined by the court. A petition may, at the same time, be filed for letters of administration with the will annexed. En. March 11, 1872. §1351 Am'd p. 493

Cal. Rep. Cit. 88, 308; 93, 620; 98, 554.

Prob. Act, sec. 43. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 631.

Letters of administration with will annexed: Post, sec. 1356.

§ 1352. Married woman may be executrix. A married woman may be appointed an executrix. The authority of an executrix who was unmarried when appointed is not extinguished nor affected by her marriage. En. March 11, 1872. Am'd. 1891, 136.

Cal. Rep. Cit. 70, 344; 78, 584.

Prob. Act, sec. 44. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 631.

Cal. Rep. Cit. 18, 20.

Married woman, may be administratrix: Post, sec. 1370.

§ 1353. Executor of an executor. No executor of an executor shall, as such, be authorized to administer on the estate of the first testator, but on the death of the sole or

surviving executor of any last will, letters of administration with the will annexed, of the estate of the first testator, left unadministered, must be issued. En. March 11, 1872.

Cal. Rep. Cit. 134, 436.

Prob. Act, sec. 45. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Letters of administration with will annexed: Post, sec. 1356.

§ 1354. Letters of administration where minor executor. Where a person absent from the state, or a minor, is named executor—if there is another executor who accepts the trust and qualifies—the latter may have letters testamentary and administer the estate until the return of the absentee or the majority of the minor, who may then be admitted as joint executor. If there is no other executor, letters of administration with the will annexed must be granted; but the court may, in its discretion, revoke them on the return of the absent executor, or the arrival of the minor at the age of majority. En. March 11, 1872.

Cal. Rep. Cit. 80, 384; 80, 385; 108, 488; 108, 489; 122, 382.

Prob. Act, sec. 46. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

§ 1355. Acts of a portion of executors valid. When all the executors named are not appointed by the court, those appointed have the same authority to perform all acts and discharge the trust, required by the will, as effectually for every purpose as if all were appointed and should act together; where there are two executors or administrators, the act of one alone shall be effectual, if the other is absent from the state, or laboring under any legal disability from serving, or if he has given his coexecutor or coadministrator authority in writing, to act for both; and where there are more than two executors or administrators, the act of a majority is valid. En. March 11, 1872.

Cal. Rep. Cit. 54, 306.

Prob. Act, sec. 47. En. April 22, 1850. Rep. 1851, 489. En. 1851. Am'd. 1861, 631.

Remainder of executors acting, where some incapacitated, etc.: Post, sec. 1425.

Joint authority: Ante, sec. 15.

Authority of executors, before qualifying: Civ. Code, sec. 1373; before letters revoked: Post, sec. 1428; powers, etc., generally: Post, secs. 1581 et seq.; foreign executor: Post, sec. 1913.

Revocation of probate, effect of: Ante, sec. 1331.

Removals and suspensions: Post, secs. 1436 et seq.

§ 1356. Authority of administrators with will annexed. Letters, how issued. Administrators with the will annexed have the same authority over the estates which executors named in the will would have, and their acts are as effectual for all purposes. Their letters must be signed by the clerk of the court, and bear the seal thereof. En. March 11, 1872.

Prob. Act, sec. 48. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 32, 441.

Prob. Act, sec. 49. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Executor of executor: Ante, sec. 1353.

ARTICLE II.

FORM OF LETTERS.

§ 1360. Form of letters testamentary.

§ 1361. Form of letters of administration with the will annexed.

§ 1362. Form of letters of administration.

§ 1360. Form of letters testamentary. Letters testamentary must be substantially in the following form: State of California, county, or city and county of —. The last will of A. B., deceased, a copy of which is hereto annexed, having been proved and recorded in the superior court of the county, or city and county, of —, C. D., who is named therein as such, is hereby appointed executor. Witness, G. H., clerk of the superior court of the county, or city and county, of —, with the seal of the court affixed, the — day of —, A. D. 18—. (Seal.) By order of the court. G. H., clerk. En. March 11, 1872. Am'd. 1880, 79.

Prob. Act, sec. 50. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Seal, required: Ante, sec. 153, subd. 2; of courts, generally: Ante, secs. 147-153.

§ 1361. Form of letters of administration with the will annexed. Letters of administration, with the will annexed, must be substantially in the following form: State of California, county, [or city and county], of ——. The last will of A. B., deceased, a copy of which is hereto annexed, having been proved and recorded in the superior court of the county, or city and county, of —, and there being no executor named in the will (or as the case may be), C. D. is hereby appointed administrator with the will annexed. Witness, G. H., clerk of the superior court of the county, or city and county of —, with the seal of the court affixed, the — day of —, A. D. 18—. (Seal.) By order of the court. G. H., clerk. En. March 11, 1872. Am'd. 1880, 79.

Prob. Act, sec. 51. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

§ 1362. Form of letters of administration. Letters of administration must be signed by the clerk, under the seal of the court, and substantially in the following form: State of California, county, or city and county, of ——. C. D. is hereby appointed administrator of the estate of A. B., deceased. (Seal.) Witness, G. H., clerk of the superior court of the county, or city and county, of —, with the seal thereof affixed, the — day of —, A. D. 18—. By order of the court. G. H., clerk. En. March 11, 1872. Am'd. 1880, 79.

Cal. Rep. Cit. 64, 10; 122, 41.

Prob. Act, sec. 71. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

ARTICLE III.

LETTERS OF ADMINISTRATION, TO WHOM AND THE ORDER
IN WHICH THEY ARE GRANTED.

- § 1365. Order of persons entitled to administer. Partner not to administer.
- § 1366. Preference of persons equally entitled.
- § 1367. In discretion of court to appoint administrator, when.
- § 1368. When minor or incompetent entitled, who appointed administrator.
- § 1369. Who are incompetent to act as administrators.
- § 1370. Married woman may be administratrix.

§ 1365. Order of persons entitled to administer. Partner not to administer. Administration of the estate of a person dying intestate must be granted to some one or more of the persons hereinafter mentioned, the relatives of the deceased being entitled to administer only when they are entitled to succeed to his personal estate, or some portion thereof; and they are, respectively, entitled thereto in the following order:

1. The surviving husband or wife, or some competent person whom he or she may request to have appointed.
2. The children.
3. The father or mother.
4. The brothers.
5. The sisters.
6. The grandchildren.
7. The next of kin entitled to share in the distribution of the estate.
8. The public administrator.
9. The creditors.
10. Any person legally competent.

If the decedent was a member of a partnership at the time of his decease, the surviving partner must in no case be appointed administrator of his estate. En. March 11, 1872. Am'd. 1875-6, 102; 1877-8, 111.

Cal. Rep. Cit. 46, 574; 52, 539; 54, 216; 54, 217; 56, 420; 57, 82; 64, 227; 65, 309; 72, 165; 72, 166; 74, 340; 74, 341; 76, 297; 88, 620; 93, 612; 97, 340; 97, 341; 97, 342; 97, 428; 97, 429; 100, 80; 103, 588; 106, 455; 108, 488; 110, 410; 114, 465; 118, 278; 118, 279; 127, 661; 127, 662; 135, 8; 136, 111; 136, 113; 141, 542; 143, 442; 143, 445; 143, 446; 143, 608; 146, 593. Subd. 1—78, 585; 120, 346; 120, 349; 122, 163; 122, 164; 122, 165; 132, 309. Subd. 2—132, 402; 132, 403. Subd. 4—143,

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440. Subd. 7—136, 112. Subd. 8—120, 343; 122, 163.
Subd. 10—53, 245.

Prob. Act, sec. 52. En. April 22, 1850. Rep. 1851, 489.
En. 1851, 448. Am'd. 1855, 133; 1861, 631; 1864, 522.

Cal. Rep. Cit. 7, 232; 7, 230; 16, 165; 16, 367; 16, 164;
17, 536; 25, 515; 34, 468.

Public administrators, generally: Post, secs. 1726 et seq.
Incompetent persons: Post, secs. 1369, 1370.

Recommendation by one entitled to administer: Post,
sec. 1379.

§ 1366. Preference of persons equally entitled. Of several persons claiming and equally entitled to administer, males must be preferred to females, and relatives of the whole to those of the half blood. En. March 11, 1872.

Cal. Rep. Cit. 132, 402; 141, 542.

Prob. Act, sec. 53. En. April 22, 1850. Rep. 1851, 489.
En. 1851, 448.

§ 1367. In discretion of court to appoint administrator, when. When there are several persons equally entitled to the administration, the court may grant letters to one or more of them; and when a creditor is claiming letters, the court may, in its discretion, at the request of another creditor, grant letters to any other person legally competent. En. March 11, 1872.

Cal. Rep. Cit. 46, 574; 132, 402; 143, 440; 143, 443; 143, 445; 143, 446.

Prob. Act, sec. 54. En. April 22, 1850. Rep. 1851, 489.
En. 1851, 448. Am'd. 1864, 368.

§ 1368. When minor or incompetent entitled, who appointed administrator. If any person entitled to administration is a minor or an incompetent person, letters must be granted to his or her guardian, or any other person entitled to letters of administration, in the discretion of the court. En. March 11, 1872. Am'd. 1893, 52.

Cal. Rep. Cit. 80, 384; 97, 429; 103, 430; 143, 439; 143, 440; 143, 441; 143, 443; 143, 444; 143, 445; 143, 446.

Prob. Act, sec. 57. En. April 22, 1850. Rep. 1851, 489.
En. 1851, 448. Am'd. 1870, 637.

Guardian of minor: Ante, secs. 372, 373, post, secs. 1747. 1759.

§ 1369. Who are incompetent to act as administrators. No person is competent or entitled to serve as administrator or administratrix who is:

1. Under the age of majority.
2. Not a bona fide resident of the state.
3. Convicted of an infamous crime.
4. Adjudged by the court incompetent to execute the duties of the trust by reason of drunkenness, improvidence, or want of understanding or integrity. En. March 11, 1872. Am'd. 1877-8, 112.

Cal. Rep. Cit. 54, 216; 54, 217; 63, 459; 63, 460; 64, 228; 72, 165; 80, 383; 88, 620; 93, 612; 97, 429; 103, 587; 104, 624; 110, 410; 142, 130; 142, 131; 142, 132; 142, 133; 143, 440; 143, 441; 143, 445. Subd. 2—120, 638; 122, 381.

Prob. Act, sec. 55. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 632.

Revoking letters: See sec. 1383, post.

§ 1370. Married woman may be administratrix. A married woman may be appointed administratrix. When an unmarried woman appointed administratrix marries, her authority is not thereby extinguished. En. March 11, 1872. Am'd. 1891, 11.

Cal. Rep. Cit. 132, 310; 132, 311.

Prob. Act, sec. 56. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1866, 765; 1870, 636; 1872, 94.

Married woman as executrix: Ante, sec. 1352.

ARTICLE IV.

PETITION AND CONTEST FOR LETTERS, AND ACTION THEREON.

§ 1371. Applications, how made.

§ 1372. When granted.

§ 1373. Clerk of court must set day for hearing. Notice of application.

§ 1374. Contesting application.

§ 1375. Hearing of application.

§ 1376. Evidence of notice.

§ 1377. Grant to any applicant.

§ 1378. What proofs must be made before granting letters of administration.

§ 1379. Letters may be granted to others than those entitled

§ 1371. Applications, how made. Petitions for letters of administration must be in writing, signed by the applicant. Am'd. p. 493

cant or his counsel, and filed with the clerk of the court, stating the facts essential to give the court jurisdiction of the case, and when known to the applicant, he must state the names, ages, and residence of the heirs of the decedent, and the value and character of the property. If the jurisdictional facts existed, but are not fully set forth in the petition, and are afterward proved in the course of administration, the decree or order of administration and subsequent proceedings are not void on account of such want of jurisdictional averments. En. March 11, 1872.

Cal. Rep. Cit. 71, 522; 76, 297; 100, 80.

Prob. Act, sec. 58. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 632.

Orders and decrees need not recite the facts: Post, sec. 1704.

§ 1372. When granted. Letters of administration may be granted by the court at any time appointed for the hearing of the application, or at any time to which the hearing is continued or postponed. En. March 11, 1872. Am'd. 1880, 79.

Prob. Act, sec. 59. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

§ 1373. Clerk of court must set day for hearing. Notice of application. When a petition praying for letters of administration is filed, the clerk of the court must set the petition for hearing by the court, and give notice thereof by causing notices to be posted in at least three public places in the county, one of which must be at the place where the court is held, containing the name of the decedent, the name of the applicant, and the time at which the application will be heard. Such notice must be given at least ten days before the hearing. En. March 11, 1872. Am'd. 1880, 80; 1891, 427.

Cal. Rep. Cit. 84, 109; 105, 182; 142, 552.

Prob. Act, sec. 60. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Posting notices: Compare, ante, sec. 1303.

§ 1374. Contesting application. Any person interested may contest the petition, by filing written opposition there-

to, on the ground of the incompetency of the applicant, or may assert his own rights to the administration, and pray that letters be issued to himself. In the latter case the contestant must file a petition, and give the notice required for an original petition, and the court must hear the two petitions together. En. March 11, 1872.

Cal. Rep. Cit. 98, 554; 100, 80; 122, 163; 142, 133; 142, 552.

Prob. Act, sec. 61. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 632.

Cal. Rep. Cit. 28, 186.

Incompetency of the applicant: Ante, sec. 1369.

Persons entitled to administer: Ante, sec. 1365.

§ 1375. Hearing of application. On the hearing, it being first proved that notice has been given as herein required, the court must hear the allegations and proofs of the parties, and order the issuing of letters of administration to the party best entitled thereto. En. March 11, 1872.

Cal. Rep. Cit. 100, 80.

Prob. Act, sec. 62. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 34, 468.

Proof of notice: Compare, ante, sec. 1306.

Conclusive evidence: Post, sec. 1376.

§ 1376. Evidence of notice. An entry in the minutes of the court, that the required proof was made and notice given, shall be conclusive evidence of the fact of such notice. En. March 11, 1872.

Prob. Act, sec. 63. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 7, 234; 7, 238.

§ 1377. Grant to any applicant. Letters of administration must be granted to any applicant, though it appears that there are other persons having better rights to the administration, when such persons fail to appear and claim the issuing of letters to themselves. En. March 11, 1872.

Cal. Rep. Cit. 56, 410; 120, 348.

Prob. Act, sec. 64. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 7, 231.

Other persons having better rights—May procure revocation: Post, secs. 1383-1386.

§ 1378. What proofs must be made before granting letters of administration. Before letters of administration are granted on the estate of any person who is represented to have died intestate, the fact of his dying intestate must be proved by the testimony of the applicant or others; and the court may also examine any other person concerning the time, place, and manner of his death, the place of his residence at the time, the value and character of his property, and whether or not the decedent left any will, and may compel any person to attend as a witness for that purpose. En. March 11, 1872.

Prob. Act, sec. 65. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 632.

Witness—Compelling attendance of: Post, secs. 1985 et seq.

§ 1379. Letters may be granted to others than those entitled. Administration may be granted to one or more competent persons, although not otherwise entitled to the same, at the written request of the person entitled, filed in the court. When the person entitled is a nonresident of the state, affidavits, taken ex parte before any officer authorized by the laws of this state to take acknowledgments and administer oaths out of this state, may be received as prima facie evidence of the identity of the party, if free from suspicion, and the fact is established to the satisfaction of the court. En. March 11, 1872. Am'd. 1877-8, 112; 1880, 113.

Cal. Rep. Cit. 53, 245; 54, 217; 56, 420; 57, 82; 63, 459; 63, 460; 64, 228; 72, 166; 93, 613; 97, 340; 97, 341; 97, 342; 97, 343; 97, 429; 104, 624; 120, 346; 122, 164; 122, 165; 135, 8; 141, 541; 143, 445.

Prob. Act, sec. 66. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 632.

Cal. Rep. Cit. 16, 164; 16, 165; 28, 186.

Proof of identity.—Affidavits: Post, secs. 2009-2015; depositions out of the state: Post, secs. 2024-2028; prima facie evidence: Post, sec. 1833.

ARTICLE V.

REVOCATION OF LETTERS AND PROCEEDINGS THEREFOR.

§ 1333. Revocation of letters of administration.

§ 1334. When petition filed, citation to issue.

§ 1335. Hearing of petition for revocation.

§ 1336. Prior rights of relatives entitles them to revoke prior letters.

§ 1333. Revocation of letters of administration. When letters of administration have been granted to any other person than the surviving husband or wife, child, father, mother, brother, or sister of the intestate, any one of them who is competent, or any competent person at the written request of any one of them, may obtain the revocation of the letters, and be entitled to the administration, by presenting to the court a petition praying the revocation, and that letters of administration may be issued to him. En. March 11, 1872. Am'd. 1880, 80.

Cal. Rep. Cit. 56, 327; 72, 166; 84, 110; 88, 481; 97, 342; 98, 535; 99, 375; 108, 487; 108, 488; 108, 489; 120, 349; 122, 164; 142, 130; 147, 345.

Prob. Act, sec. 67. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1870, 400.

Cal. Rep. Cit. 16, 165.

Persons incompetent: Ante, secs. 1369, 1370.

Revocation: See secs. 1336, 1436-1440, post.

§ 1334. When petition filed, citation to issue. When such petition is filed, the clerk must, in addition to the notice provided in section thirteen hundred and seventy-three, issue a citation to the administrator to appear and answer the same at the time appointed for the hearing. En. March 11, 1872. Am'd. 1873-4, 359.

Cal. Rep. Cit. 56, 327; 72, 24; 120, 349; 120, 384.

Prob. Act, sec. 68. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 633.

Citation—Generally: Post, secs. 1707-1711.

§ 1335. Hearing of petition for revocation. At the time appointed, the citation having been duly served and returned, the court must proceed to hear the allegations and proofs of the parties; and if the right of the applicant is established, and he is competent, letters of administration

must be granted to him, and the letters of the former administrator revoked. En. March 11, 1872.

Cal. Rep. Cit. 56, 327; 120, 349; 142, 130.

Prob. Act, sec. 69. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

§ 1386. Prior rights of relatives entitles them to revoke prior letters. The surviving husband or wife, when letters of administration have been granted to a child, father, brother, or sister of the intestate; or any of such relatives, when letters have been granted to any other of them, may assert his prior right, and obtain letters of administration, and have the letters before granted revoked in the manner prescribed in the three preceding sections. En. March 11, 1872.

Cal. Rep. Cit. 56, 327; 120, 349; 132, 310.

Prob. Act, sec. 70. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1870, 400.

ARTICLE VI.

OATHS AND BONDS OF EXECUTORS AND ADMINISTRATORS.

§ 1387. Administrator or executor to take oath. Letters and bond to be recorded.

§ 1388. Bond of administrators, form and requirements of.

§ 1389. Additional bonds, when required.

§ 1390. Conditions of bonds.

§ 1391. Separate bonds, where more than one administrator.

§ 1392. Several recoveries may be had on same bond.

§ 1393. Bonds, and justification of sureties on. Must be approved.

§ 1394. Citation and requirements of judge on deficient bond. Additional security.

§ 1395. Right ceases, when sufficient security not given.

§ 1396. When bond may be dispensed with.

§ 1397. Petition showing failing sureties and asking for further bonds.

§ 1398. Citation to executor, etc., to show cause against such application.

§ 1399. Further security may be ordered.

§ 1400. Neglecting to obey order.

§ 1401. Suspending powers of executor, etc.

§ 1402. Further security ordered without application of party in interest.

§ 1403. Release of sureties.

§ 1404. New sureties.

§ 1405. Neglect to give new sureties forfeits letters.

§ 1406. Application to be determined any time.

§ 1407. Liability on bond.

§ 1387. Administrator or executor to take oath. Letters and bond to be recorded. Before letters testamentary

or of administration are issued to the executor or administrator, he must take and subscribe an oath before some officer authorized to administer oaths, that he will perform, according to law, the duties of executor or administrator, which oath must be attached to the letters. All letters testamentary and of administration issued to, and all bonds executed by, executors or administrators, with the affidavits and certificates thereon, must be forthwith recorded by the clerk of the court having jurisdiction of the estates, in books to be kept by him in his office for that purpose. En. March 11, 1872.

Cal. Rep. Cit. 96, 593.

Prob. Act, sec. 72. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 663; 1863, 23.

Cal. Rep. Cit. 34, 468; 34, 469.

§ 1388. Bond of administrators, form and requirements of. Every person to whom letters testamentary or of administration are directed to issue must, before receiving them, execute a bond to the state of California, with two or more sufficient sureties, to be approved by the superior court, or a judge thereof. In form, the bond must be joint and several, and the penalty must not be less than twice the value of the personal property, and twice the probable value of the annual rents, profits, and issues of real property belonging to the estate, which values must be ascertained by the superior court, or a judge thereof, by examining on oath the party applying, and any other persons. En. March 11, 1872. Am'd. 1880, 80.

Cal. Rep. Cit. 101, 128; 112, 267; 127, 661; 127, 662.

Prob. Act, sec. 73. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1864, 368.

Sureties: Post, secs. 1393, 1394, 1397-1400, 1403, 1404, 1407.

Approved by judge, at chambers: Ante, sec. 166.

Bond—condition of: Post, sec. 1390; separate, when: Post, sec. 1391; recovery on: Post, secs. 1392, 1407; not required, when: Post, sec. 1396; further security: Post, secs. 1389, 1394-1402; stands as undertaking on appeal: Sec. 965.

Bond, reduction of, on deposit of personal securities with certain corporations: See act of April 6, 1891,, Stats. 1891, p. 490, sec. 4.

§ 1389. Additional bonds, when required. The superior court, or a judge thereof, must require an additional bond whenever the sale of any real estate belonging to an estate is ordered; but no such additional bond must be required when it satisfactorily appears to the court that the penalty of the bond given before receiving letters, or of any bond given in place thereof, is equal to twice the value of the personal property remaining in or that will come into the possession of the executor or administrator, including the annual rents, profits, and issues of real estate, and twice the probable amount to be realized on the sale of the real estate ordered to be sold. En. March 11, 1872. Am'd. 1880, 80.

Cal. Rep. Cit. 50, 309; 123, 438.

Additional bond may be required of public administrator: Post, sec. 1727.

§ 1390. Conditions of bonds. The bond must be conditioned that the executor or administrator shall faithfully execute the duties of the trust according to law. En. March 11, 1872.

Duties of the trustee: Post, secs. 1581 et seq.

§ 1391. Separate bonds, where more than one administrator. When two or more persons are appointed executors or administrators, the superior court, or a judge thereof, must require and take a separate bond from each of them. En. March 11, 1872. Am'd. 1880, 80.

Cal. Rep. Cit. 74, 213.

Prob. Act, sec. 74. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

§ 1392. Several recoveries may be had on same bond. The bond shall not be void upon the first recovery, but may be sued and recovered upon from time to time, by any person aggrieved, in his own name, until the whole penalty is exhausted. En. March 11, 1872.

Prob. Act, sec. 75. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

In his own name, party beneficially interested: Ante, sec. 367.

Kind of money, payable under bond: Post, sec. 1407.

§ 1393. Bonds, and justification of sureties on. Must be approved. In all cases where bonds or undertakings are required to be given, under this title, the sureties must justify thereon in the same manner and in like amounts as required by section ten hundred and fifty-seven of this code, and the certificate thereof must be attached to and filed and recorded with the bond or undertaking. All such bonds and undertakings must be approved by a judge of the superior court before being filed or recorded. En. March 11, 1872. Am'd. 1880, 81.

Prob. Act, sec. 76. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1855, 299; 1861, 633; 1862, 424; 1864, 368.

Approved by judge, at chambers: Ante, sec. 166.

Examination of sureties, when qualifications questioned: Post, sec. 1394.

§ 1394. Citation and requirements of judge on deficient bond. Additional security. Before the judge approves any bond required under this title, and after its approval, he may, of his own motion, or upon the motion of any person interested in the estate, supported by affidavit that the sureties, or some one or more of them, are not worth as much as they have justified to, order a citation to issue requiring such sureties to appear before him at a designated time and place, to be examined touching their property and its value; and the judge must, at the same time, cause a notice to be issued to the executor or administrator requiring his appearance on the return of the citation; and on its return he may examine the sureties and such witnesses as may be produced, touching the property of the sureties and its value; and if, upon such examination, he is satisfied that the bond is insufficient, he must require sufficient additional security. En. March 11, 1872. Am'd. 1873-4, 359; 1880, 81.

Cal. Rep. Cit. 72, 24; 111, 156.

Citations: Post, secs. 1707, 1711.

Additional security, effect of failure to give, in time: Post, sec. 1395.

§ 1395. Right ceases, when sufficient security not given. If sufficient security is not given within the time fixed by the judge's order, the right of such executor or administrator to the administration shall cease, and the person next entitled to the administration on the estate, who will execute a sufficient bond, must be appointed to the administration. En. March 11, 1872.

Cal. Rep. Cit. 111, 157; 111, 158.

§ 1396. When bond may be dispensed with. When it is expressly provided in the will that no bond shall be required of the executor, letters testamentary may issue, and sales of real estate be made and confirmed without any bond, unless, the court, for good cause, require one to be executed; but the executor may at any time afterward, (if it appear from any cause necessary or proper), be required to file a bond, as in other cases. En. March 11, 1872. Am'd. 1873-4, 360.

Cal. Rep. Cit. 53, 20.

Prob. Act, sec. 77. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1864, 369.

§ 1397. Petition showing failing sureties and asking for further bonds. Any person interested in an estate may, by verified petition, represent to the superior court, or a judge thereof, that the sureties of the executor or administrator thereof have become, or are becoming, insolvent, or that they have removed, or are about to remove, from the state, or that from any other cause the bond is insufficient, and ask that further security be required. En. March 11, 1872. Am'd. 1880, 81.

Cal. Rep. Cit. 64, 39; 146, 171.

Prob. Act, sec. 78. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 68, 86.

Ask further security, court may: Post, sec. 1402.

§ 1398. Citation to executor, etc., to show cause against such application. If the court, or a judge thereof, is satis-

And that the matter requires investigation, a citation must be issued to the executor or administrator, requiring him to appear, at a time and place to be therein specified, to show cause why he should not give further security. The citation must be served personally on the executor or administrator, at least five days before the return day. If he has absconded, or cannot be found, it may be served by leaving a copy of it at his place of residence, or by such publication as the court or a judge thereof may order. En. March 11, 1872. Am'd. 1880, 81.

Cal. Rep. Cit. 72, 24; 116, 451.

Prob. Act, sec. 79. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 68, 86.

§ 1399. Further security may be ordered. On the return of the citation, or at such other time as the judge may appoint, he must proceed to hear the proofs and allegations of the parties. If it satisfactorily appears that the security is from any cause insufficient, he may make an order requiring the executor or administrator to give further security, or to file a new bond in the usual form, within a reasonable time, not less than five days. En. March 11, 1872.

Prob. Act, sec. 80. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 68, 86.

§ 1400. Neglecting to obey order. If the executor or administrator neglects to comply with the order within the time prescribed, the judge must, by order, revoke his letters, and his authority must thereupon cease. En. March 11, 1872.

Prob. Act, sec. 81. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 68, 86.

§ 1401. Suspending powers of executor, etc. When a petition is presented praying that an executor or administrator be required to give further security, or to give bond, where by the terms of the will no bond was originally re-

quired, and it is alleged on oath that the executor or administrator is wasting the property of the estate, the judge may, by order, suspend his powers until the matter can be heard and determined. En. March 11, 1872.

Cal. Rep. Cit. 53, 20.

Prob. Act, sec. 82. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

§ 1402. **Further security ordered without application of party in interest.** When it comes to his knowledge that the bond of any executor or administrator is from any cause insufficient, the judge, without any application, must cause him to be cited to appear and show cause why he should not give further security, and must proceed thereon as upon the application of any person interested. En. March 11, 1872. Am'd. 1880, 81.

Cal. Rep. Cit. 64, 39; 116, 451; 127, 662; 146, 171.

Prob. Act, sec. 83. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

§ 1403. **Release of sureties.** When a surety of any executor or administrator desires to be released from responsibility on account of future acts, he may make application to the superior court, or a judge thereof, for relief. The court or judge must cause a citation to the executor or administrator to be issued, and served personally, requiring him to appear at a time and place to be therein specified, and to give other security. If he has absconded, left, or removed from the state, or if he cannot be found, after due diligence and inquiry, service may be made as provided in section one thousand three hundred and ninety-eight. En. March 11, 1872. Am'd. 1880, 82.

Cal. Rep. Cit. 64, 40; 72, 24; 107, 213; 116, 451; 146, 170.

Prob. Act, sec. 84. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 633.

§ 1404. **New sureties.** If new sureties be given to the satisfaction of the judge, he may thereupon make an order that the sureties who applied for relief shall not be liable on their bond for any subsequent act, default, or misconduct of the executor or administrator. En. March 11, 1872.

Cal. Rep. Cit. 65, 594; 67, 383; 107, 213.

Prob. Act, sec. 85. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

§ 1405. Neglect to give new sureties forfeits letters. If the executor or administrator neglects or refuses to give new sureties, to the satisfaction of the judge, on the return of the citation, or within such reasonable time as the judge shall allow, unless the surety making the application shall consent to a longer extension of time, the court or judge must, by order, revoke his letters. En. March 11, 1872.

Prob. Act, sec. 86. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 634.

§ 1406. Application to be determined any time. The applications authorized by the nine preceding sections of this chapter may be heard and determined at any time. All orders made therein must be entered upon the minutes of the court. En. March 11, 1872. Am'd. 1880, 82.

Prob. Act, sec. 87. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

§ 1407. Liability on bond. The liability of principal and sureties upon the bond of any executor, administrator, or guardian, is in all cases to pay in the kind of money or currency in which the principal is legally liable. En. Stats. 1873-4, 361.

Cal. Rep. Cit. 76, 299.

ARTICLE VII.

SPECIAL ADMINISTRATORS AND THEIR POWERS AND DUTIES

§ 1411. Special administrator, when appointed.

§ 1412. Special letters may issue at any time.

§ 1413. Preference given to persons entitled to letters.

§ 1414. Special administrator to give bond and take oath.

§ 1415. Duties of special administrator.

§ 1416. When letters testamentary or of administration are granted, special administrator's powers cease.

§ 1417. Special administrator to render account.

§ 1411. Special administrator, when appointed. When there is delay in granting letters testamentary or of administration from any cause, or when such letters are

granted irregularly, or no sufficient bond is filed as required, or when no application is made for such letters, or when an executor or administrator dies, or is suspended, or removed, the superior court, or a judge thereof, must appoint a special administrator to collect and take charge of the estate of the decedent in whatever county or counties the same may be found, and to exercise such other powers as may be necessary for the preservation of the estate; or he may direct the public administrator of his county to take charge of the estate. En. March 11, 1872. Am'd. 1880, 82.

Cal. Rep. Cit. 70, 344; 86, 73; 94, 568; 98, 66; 106, 432; 111, 158; 142, 118; 142, 433.

Prob. Act, sec. 88. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1855, 133.

Cal. Rep. Cit. 7, 231; 22, 67.

Prob. Act, sec. 95. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 20, 311.

Prob. Act, sec. 282. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 652.

§ 1412. Special letters may issue at any time. The appointment may be made at any time, and without notice, and must be made by entry upon the minutes of the court specifying the powers to be exercised by the administrator. Upon such order being entered, and after the person appointed has given bond, the clerk must issue letters of administration to such person in conformity with the order. En. March 11, 1872. Am'd. 1880, 82.

Cal. Rep. Cit. 78, 301.

Prob. Act, sec. 89. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 22, 67.

Oath and bond: Post, sec. 1414.

§ 1413. Preference given to persons entitled to letters. In making the appointment of a special administrator, the court or judge must give preference to the person entitled to letters testamentary or of administration, but no appeal must be allowed from the appointment. En. March 11, 1872. Am'd. 1880, 82.

Cal. Rep. Cit. 73, 203; 142, 433.

Prob. Act, sec. 90. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 97, 570.

Persons entitled to letters: Ante, secs. 1365 et seq.

§ 1414. **Special administrator to give bond and take oath.** Before any letters issue to any special administrator, he must give bond in such sum as the court or judge may direct, with sureties to the satisfaction of the court or judge, conditioned for the faithful performance of his duties; and he must take the usual oath, and have the same indorsed on his letters. En. March 11, 1872. Am'd. 1880, 82.

Prob. Act, sec. 91. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Oath and bond of administrator, etc.: Ante, secs. 1387-1407.

§ 1415. **Duties of special administrator.** The special administrator must collect and preserve for the executor or administrator, all the goods, chattels, debts, and effects of the decedent, all incomes, rents, issues, and profits claims, and demands of the estate; must take the charge and management of, enter upon and preserve from damage, waste, and injury, the real estate, and for any such and all necessary purposes may commence and maintain or defend suits and other legal proceedings as an administrator; he may sell such perishable property as the court may order to be sold, and exercise such other powers as are conferred upon him by his appointment, but in no case is he liable to an action by any creditor on a claim against the decedent. En. March 11, 1872. Am'd. 1880, 83.

Cal. Rep. Cit. 50, 302; 69, 240; 106, 431; 106, 432; 106, 433.

Prob. Act, sec. 92. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 634.

Cal. Rep. Cit. 7, 232.

§ 1416. **When letters testamentary or of administration are granted, special administrator's powers cease.** When letters testamentary or of administration on the estate of the decedent have been granted, the powers of the special administrator cease, and he must forthwith deliver

to the executor or administrator all the property and effects of the decedent in his hands; and the executor or administrator may prosecute to final judgment any suit commenced by the special administrator. En. March 11, 1872.

Cal. Rep. Cit. 142, 433.

Prob. Act, sec. 93. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

1417
m'd. § 1417. Special administrator to render account. The
. 494 special administrator must render an account, on oath, of his proceedings in a like manner as other administrators are required to do. En. March 11, 1872.

Cal. Rep. Cit. 69, 241.

Prob. Act, sec. 94. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Account of administrator, etc.: Post, secs. 1622 et seq.

ARTICLE VIII.

WILLS FOUND AFTER LETTERS OF ADMINISTRATION GRANTED, AND MISCELLANEOUS PROVISIONS.

§ 1423. On proof of will, after grant of letters of administration, letters revoked.

§ 1424. Power of executor in such a case.

§ 1425. Remaining administrator or executor to continue when his colleagues are disqualified.

§ 1426. Who to act when all acting are incompetent.

§ 1427. Executor or administrator may resign, when. Court to appoint successor. Liability of outgoer.

§ 1428. All acts of executor, etc., valid until his power is revoked.

§ 1429. Transcript of court minutes to be evidence.

1423
m'd. § 1423. On proof of will, after grant of letters of admin-
. 494 istration, letters revoked. If, after granting letters of administration on the ground of intestacy, a will of the decedent is duly proved and allowed by the court, the letters of administration must be revoked, and the power of the administrator ceases, and he must render an account of his administration within such time as the court shall direct. En. March 11, 1872.

Prob. Act, sec. 98. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Account of administration: Secs. 1622 et seq.

§ 1424. Power of executor in such a case. In such case, the executor or the administrator with the will annexed is entitled to demand, sue for, recover and collect all the rights, goods, chattels, debts and effects, of the decedent remaining unadministered, and may prosecute to final judgment any suit commenced by the administrator before the revocation of his letters of administration. En. March 11, 1872.

Prob. Act, sec. 99. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

§ 1425. Remaining administrator or executor to continue when his colleagues are disqualified. In case any one of several executors or administrators to whom letters are granted, dies, becomes lunatic, is convicted of an infamous crime, or otherwise becomes incapable of executing the trust; or in case the letters testamentary or of administration are revoked or annulled, with respect to any one executor or administrator, the remaining executor or administrator must proceed to complete the execution of the will or administration. En. March 11, 1872.

Cal. Rep. Cit. 68, 283; 99, 218; 108, 488.

Prob. Act, sec. 96. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 20, 311.

§ 1426. Who to act when all acting are incompetent. If all such executors or administrators die or become incapable, or the power and authority of all of them is revoked, the court must issue letters of administration, with the will annexed or otherwise, to the widow or next of kin, or others, in the same order and manner as is directed in relation to original letters of administration. The administrators so appointed must give bond in the like penalty, with like sureties and conditions, as hereinbefore required of administrators, and shall have the like power and authority. En. March 11, 1872. Am'd. 1880, 83.

Cal. Rep. Cit. 68, 283; 99, 218; 108, 488; 112, 16.

Prob. Act, sec. 97. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 32, 441.

Letters of administration—Order and manner of granting: Ante, secs. 1365 et seq.; with will annexed: Ante, sec. 1356.

Oath and bond: Ante, secs. 1387-1407.

Power and authority: Post, secs. 1581 et seq.

§ 1427. Executor or administrator may resign, when. Court to appoint successor. Liability of outgoer. Any executor or administrator may, at any time, by writing, filed in the superior court, resign his appointment, having first settled his accounts and delivered up all the estate to the person whom the court shall appoint to receive the same. If, however, by reason of any delays in such settlement and delivery up of the estate, or for any other cause, and circumstances of the estate or the rights of those interested therein require it, the court may at any time before settlement of accounts and delivering up of the estate is completed, revoke the letters of such executor or administrator, and appoint in his stead an administrator, either special or general, in the same manner as is directed in relation to original letters of administration. The liability of the outgoing executor or administrator, or of the sureties on his bond, shall not be in any manner discharged, released, or affected by such appointment or resignation. En. March 11, 1872. Am'd. 1880, 83.

Cal. Rep. Cit. 70, 342; 78, 584; 80, 16; 127, 452.

Prob. Act, sec. 100. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1858, 105.

§ 1428. All acts of executor, etc., valid until his power is revoked. All acts of an executor or administrator as such, before the revocation of his letters testamentary or of administration, are as valid to all intents and purposes as if such executor or administrator had continued lawfully to execute the duties of his trust. En. March 11, 1872.

Prob. Act, sec. 101. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 20, 311.

§ 1429. Transcript of court minutes to be evidence. A transcript from the minutes of the court, showing the appointment of any person as executor or administrator,

together with the certificate of the clerk under his hand and the seal of his court, that such person has given bond and been qualified, and that letters testamentary or of administration have been issued to him and have not been revoked shall have the same effect in evidence as the letters themselves. En. March 11, 1872.

Prob. Act, sec. 102. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Letters and bonds recorded: Ante, sec. 1337.

ARTICLE IX.

DISQUALIFICATION OF JUDGES AND TRANSFERS OF ADMINISTRATIONS.

§ 1430. When judge not to act.

§ 1431. Transfer of probate matters to adjoining county.

§ 1432. Transfer not to change right to administer. Re-transfer, how made.

§ 1433. When proceedings to be returned to original court.

§ 1430. When judge not to act. No will shall be admitted to probate, or letters testamentary or of administration granted before any judge who is interested as next of kin to the decedent, or as a legatee or devisee under the will, or when he is named as executor or trustee in the will, or is a witness thereto, or is in any other manner interested or disqualified from acting. En. March 11, 1872. Am'd. 1880, 83.

Prob. Act, sec. 103. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1864, 369.

§ 1431. Transfer of probate matters to adjoining county. §1431
When a petition is filed in the superior court, praying for Am'd.
admission to probate of a will, or for granting letters p. 494
testamentary or of administration, or when proceedings
are pending in the superior court for the settlement of
an estate, and there is no judge of said court qualified to
act, an order must be made transferring the proceedings
to the superior court of an adjoining county, and the clerk
of the court ordering the transfer must transmit to the clerk
of the court to which the proceedings are ordered to be

transferred a certified copy of the order and all papers on file in his office in the proceedings; and thereafter the court to which the proceeding is transferred shall exercise the same authority and jurisdiction over the estate, and all matters relating to the administration thereof, as if it had original jurisdiction of the estate; provided, there shall not be any necessity for transferring such proceedings, or any of them, when a judge of some other county qualified to act attends at the request of the judge of the county where such proceedings are pending, to hold court, to conduct and to try such proceedings; and such judge, when so called upon to preside, shall exercise jurisdiction over any proceeding in the estate as is exercised in other cases under like circumstances En. March 11, 1872. Am'd. 1880, 84; 1891, 435.

Prob. Act, sec. 104. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1864, 369; 1866, 328.

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Am'd.
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§ 1432. *Transfer not to change right to administer. Retransfer, how made.* The transfer of a proceeding from one court to another as provided for in the preceding section, shall not affect the right of any person to letters testamentary or of administration on the estate transferred, but the same persons are entitled to letters testamentary or of administration on the estate, in the order hereinafter provided. If, before the administration is closed of any estate so transferred as herein provided, another person is elected or appointed, and qualified as judge of the court wherein such proceeding was originally commenced, who is not disqualified to act in the settlement of the estate, and the causes for which the proceeding was transferred no longer exist, any person interested in the estate may have the proceeding returned to the court from which it was originally transferred, by filing a petition setting forth these facts, and moving the court therefor. En. March 11, 1872. Am'd. 1880, 84.

§ 1433. *When proceedings to be returned to original court.* On hearing the motion, if the facts required by the preceding section to be set out in the petition are satisfactorily shown, and it further appears to the court that the convenience of parties interested would be promoted by such change, the judge must make an order transferring the proceeding back to the court where it was originally

commenced; and the clerk of the court ordering the transfer must transmit to the clerk of the court in which the proceeding was originally commenced, a certified copy of the order, and all the original papers on file in his office in the proceeding; and the court where the proceeding was originally commenced shall thereafter have jurisdiction and power to make all necessary orders and decrees to close up the administration of the estate. En. March 11, 1872. Am'd. 1880, 84.

ARTICLE X.

REMOVALS AND SUSPENSIONS IN CERTAIN CASES.

§ 1436. Suspension of powers of executor.

§ 1437. Executor to have notice of his suspension, and to be cited to appear.

§ 1438. Any party interested may appear on hearing.

§ 1439. Notice to absconding executors and administrators.

§ 1440. May compel attendance.

§ 1436. Suspension of powers of executor. Whenever a judge of a superior court has reason to believe, from his own knowledge, or from credible information, that any executor or administrator has wasted, embezzled, or mismanaged, or is about to waste or embezzle the property of the estate committed to his charge, or has committed or is about to commit a fraud upon the estate, or is incompetent to act, or has permanently removed from the state, or has wrongfully neglected the estate, or has long neglected to perform any act as such executor or administrator, he must, by an order entered upon the minutes of the court, suspend the powers of such executor or administrator, until the matter is investigated. En. March 11, 1872. Am'd. 1880, 84.

Cal. Rep. Cit. 61, 154; 70, 344; 83, 586; 99, 221; 122, 381; 122, 382; 122, 383; 125, 305; 125, 308; 135, 195; 137, 475.

Prob. Act, sec. 281. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 651.

Cal. Rep. Cit. 6, 669.

Misconduct of executor—As to inventory: Post, sec.

1450, 1451; as to exhibit and account: Post, secs. 1626, 1627, 1630.

Suspension of executor, etc.—Done at chambers: Ante, sec. 166.

Removal of executor: Ante, secs. 1383 et seq.

§1437 Am'd. p. 495 § 1437. Executor to have notice of his suspension, and to be cited to appear. When such suspension is made, notice thereof must be given to the executor or administrator, and he must be cited to appear and show cause why his letters should not be revoked. If he fail to appear in obedience to the citation, or if appearing, the court is satisfied that there exists cause for his removal, his letters must be revoked, and letters of administration granted anew, as the case may require. En. March 11, 1872.

Cal. Rep. Cit. 70, 344; 122, 382; 125, 305; 125, 308.

Prob. Act, sec. 283. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 6, 669.

§ 1438. Any party interested may appear on hearing. At the hearing, any person interested in the estate may appear and file his allegations in writing, showing that the executor or administrator should be removed; to which the executor or administrator may demur or answer, as hereinbefore provided. The issues raised must be heard and determined by the court. En. March 11, 1872.

Cal. Rep. Cit. 70, 344; 122, 381; 125, 305.

Prob. Act, sec. 284. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

§ 1439. Notice to absconding executors and administrators. If the executor or administrator has absconded or conceals himself, or has removed or absented himself from the state, notice may be given him of the pendency of the proceedings by publication, in such manner as the court may direct, and the court may proceed upon such notice as if the citation had been personally served. En. March 11, 1872.

Cal. Rep. Cit. 70, 344; 122, 381.

Prob. Act, sec. 285. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 652.

Compare: Post, sec. 1630.

§ 1440. May compel attendance. In the proceedings authorized by the preceding sections of this article, for the removal of an executor or administrator, the court may compel his attendance by attachment, and may compel him to answer questions, on oath, touching his administration, and, upon his refusal so to do, may commit him until he obey, or may revoke his letters, or both. En. March 11, 1872.

Cal. Rep. Cit. 61, 154; 83, 586; 122, 381.

Prob. Act, sec. 286. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 652.

Compelling obedience: Compare post, secs. 1627, 1628; as to contempt: Ante, secs. 1209, 1219.

CHAPTER IV.

OF THE INVENTORY AND COLLECTION OF THE EFFECTS OF DECEDENTS.

Article I. Inventory, Appraisement, and Possession of Estate, §§ 1443-1453.

II. Embezzlement and Surrender of Property of Estate, §§ 1453-1461.

ARTICLE I.

INVENTORY, APPRAISEMENT, AND POSSESSION OF ESTATE.

- § 1443. Inventory to be returned, including the homestead.
- § 1444. Appraisement and pay of appraisers.
- § 1445. Oath of appraisers and inventory, how made.
- § 1446. Inventory to account for moneys. If all money, no appraisement necessary.
- § 1447. Effect of naming a debtor executor.
- § 1448. Discharge or bequest of debt against executor.
- § 1449. To make oath to inventory.
- § 1450. Letters may be revoked for neglect of administrator.
- § 1451. Inventory of after-discovered property.
- § 1452. Administrator and executor to possess real and personal estate.
- § 1453. Executor or administrator to deliver real estate to heirs or devisees.

§ 1443. Inventory to be returned, including the homestead. Every executor or administrator must make and return to the court, within three months after his appointment, a true inventory and appraisement of all the estate of the decedent, including the homestead, if any, which

has come to his possession or knowledge. En. March 11, 1872. Am'd. 1880, 85.

Cal. Rep. Cit. 86, 310; 100, 168; 111, 434; 111, 458; 112, 395; 119, 477.

Prob. Act, sec. 105. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 43, 549.

§ 1444. Appraisement and pay of appraisers. To make the appraisement, the court or a judge thereof must appoint three disinterested persons (any two of whom may act), who are entitled to receive a reasonable compensation for their services, not to exceed five dollars per day, to be allowed by the court or judge. The appraisers must, with the inventory, file a verified account of their services and disbursements. If any part of the estate is in any other county than that in which letters issued, appraisers thereof may be appointed, either by the court or judge having jurisdiction of the estate or by the court or judge of such other county, on request of the court or judge having jurisdiction. No clerk or deputy, nor any person related by consanguinity or affinity to or connected by marriage or in business with the judge of the court, shall be appointed or shall be competent to act as appraiser in any estate, or matter or proceeding pending before such judge or in said court. En. March 11, 1872. Am'd. 1880, 85; 1893, 185.

Cal. Rep. Cit. 119, 477.

Prob. Act, sec. 106. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 634.

Appraisers—Duty as to homestead: Post, secs. 1476, 1486; appointed at chambers: Ante, sec. 166.

Appraiser accepting fee not allowed, a misdemeanor: See Pen. Code, sec. 653½.

§ 1445. Oath of appraisers and inventory, how made. Before proceeding to the execution of their duty, the appraisers, before any officer authorized to administer oaths, must take and subscribe an oath, to be attached to the inventory, that they will truly, honestly, and impartially appraise the property exhibited to them, according to the best of their knowledge and ability. They must then proceed to estimate and appraise the property; each article must be set down separately, with the value thereof in

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dollars and cents, in figures, opposite to the articles, respectively; the inventory must contain all the estate of the decedent, real and personal, a statement of all debts, partnerships, and other interests, bonds, mortgages, notes, and other securities for the payment of money belonging to the decedent, specifying the name of the debtor in each security, the date, the sum originally payable, the indorsements thereon, (if any) with their dates, and the sum which, in the judgment of the appraiser, may be collected on each debt, interest, or security; the inventory must show, so far as the same can be ascertained by the executor or the administrator, what portion of the property is community property, and what portion is the separate property of the decedent. En. March 11, 1872.

Cal. Rep. Cit. 58, 576; 68, 396; 119, 477.

Prob. Act, sec. 107. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 634.

§ 1446. Inventory to account for moneys. If all money, no appraisement necessary. The inventory must also contain an account of all moneys belonging to the decedent which have come to the hands of the executor or administrator, and if none, the fact must be so stated in the inventory. If the whole estate consists of money, there need not be an appraisement, but an inventory must be made and returned as in other cases. En. March 11, 1872.

Cal. Rep. Cit. 119, 477.

Prob. Act, sec. 108. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1866, 765.

§ 1447. Effect of naming a debtor executor. The naming of a person as executor does not thereby discharge him from any just claim which the testator has against him but the claim must be included in the inventory, and the executor is liable for the same, as for so much money in his hands, when the debt or demand becomes due. En. March 11, 1872.

Cal. Rep. Cit. 105, 445; 105, 446; 125, 246; 125, 248; 133, 615; 145, 236.

Prob. Act, sec. 109. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

§ 1448. Discharge or bequest of debt against executor. The discharge or bequest in a will, of any debt or demand

of the testator against the executor named, or any other person, is not valid against the creditors of the decedent, but is a specific bequest of the debt or demand. It must be included in the inventory, and if necessary, applied in the payment of debts. If not necessary for that purpose, it must be paid in the same manner and proportion as other specific legacies. En. March 11, 1872.

Cal. Rep. Cit. 52, 577.

Prob. Act, sec. 110. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

§ 1449. To make oath to inventory. The inventory must be signed by the appraisers, and the executor or administrator must take and subscribe an oath before an officer authorized to administer oaths, that the inventory contains a true statement of all the estate of the decedent which has come to his knowledge and possession, and particularly of all moneys belonging to the decedent, and of all just claims of the decedent against the affiant. The oath must be indorsed upon or annexed to the inventory. En. March 11, 1872.

Cal. Rep. Cit. 100, 167; 100, 168; 100, 169; 100, 598; 100, 600; 100, 601; 100, 602; 105, 446.

Prob. Act, sec. 111. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 635.

§ 1450. Letters may be revoked for neglect of administrator. If an executor or administrator neglects or refuses to return the inventory within the time prescribed, or within such further time, not exceeding two months, which the court or judge shall for reasonable cause allow, the court may, upon notice, revoke the letters testamentary or of administration, and the executor or administrator is liable on his bond for any injury to the estate, or any person interested therein, arising from such failure. En. March 11, 1872.

Cal. Rep. Cit. 61, 154; 106, 155; 111, 434.

Prob. Act, sec. 112. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 635.

§ 1451. Inventory of after-discovered property. Whenever property not mentioned in an inventory that is made

and filed, comes to the possession or knowledge of an executor or administrator, he must cause the same to be appraised in the manner prescribed in this article, and an inventory thereof to be returned within two months after the discovery; and the making of such inventory may be enforced, after notice, by attachment or removal from office. En. March 11, 1872.

Cal. Rep. Cit. 58, 516; 61, 154.

Prob. Act, sec. 113. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Enforced by attachment, etc.: Compare, ante, sec. 1440.

§ 1452. Administrator and executor to possess real and personal estate. The executor or administrator is entitled to the possession of all the real and personal estate of the decedent, and to receive the rents and forfeits [profits] of the real estate until the estate is settled, or until delivered over by order of the court to the heirs or devisees; and must keep in good tenantable repair all houses, buildings, and fixtures thereon which are under his control. The heirs or devisees may themselves, or jointly with the executor or administrator, maintain an action for the possession of the real estate, or for the purpose of quieting title to the same, against anyone except the executor or administrator; but this section shall not be so construed as requiring them so to do. En. March 11, 1872. Am'd. 1880, 85. §1452 Am'd. p. 496

Cal. Rep. Cit. 52, 350; 54, 122; 57, 388; 57, 459; 61, 600; 67, 329; 69, 158; 80, 260; 81, 130; 83, 293; 85, 167; 91, 662; 98, 103; 98, 266; 100, 168; 105, 183; 107, 594; 110, 501; 110, 575; 112, 399; 126, 484; 131, 671; 134, 83; 136, 34; 136, 635; 137, 174; 137, 355; 143, 272; 147, 558.

Prob. Act, sec. 114. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 20, 627; 26, 123; 29, 373; 29, 514; 31, 604; 31, 616; 31, 618; 42, 463; 57, 387.

Authority of executors: Ante, sec. 1355.

Possession of estate: Post, sec. 1581; when that of heirs, etc.: Post, sec. 1581; as to partnership property: Post, sec. 1585.

Until delivered to heirs: Post, sec. 1453.

Action by executor, etc.: Post, secs. 1458, 1531, 1532 et seq.

§ 1453. Executor or administrator to deliver real estate to heir or devisees. Unless it satisfactorily appear to the court that the rents, issues, and profits of the real estate for a longer period are necessary to be received by the executor or administrator, wherewith to pay the debts of the decedent, or that it will probably be necessary to sell the real estate for the payment of such debts, the court, at the end of the time limited for the presentation of claims against the estate, must direct the executor or administrator to deliver possession of all the real estate to the heirs at law or devisees. En. March 11, 1872. Am'd. 1880, 85.

Cal. Rep. Cit. 57, 459; 85, 167; 107, 594; 136, 419.

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ARTICLE II.

EMBEZZLEMENT AND SURRENDER OF PROPERTY OF THE ESTATE.

§ 1458. Embezzling estate before grant of letters testamentary.

§ 1459. Citation to persons suspected to have embezzled estate, etc.

§ 1460. Refusal to obey citation, penalty for, and for embezzlement. May be compelled to disclose by imprisonment. Liable for double damages.

§ 1461. Persons intrusted with estate of decedent may be cited to account.

§ 1458. Embezzling estate before grant of letters testamentary. If any person, before the granting of letters testamentary or of administration, embezzles or alienates any of the moneys, goods, chattels, or effects of a decedent, he is chargeable therewith and liable to an action by the executor or administrator of the estate, for double the value of the property so embezzled or alienated, to be recovered for the benefit of the estate. En. March 11, 1872.

Cal. Rep. Cit. 58, 415; 61, 154; 105, 606; 105, 608.

Prob. Act, sec. 116. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 29, 510; 29, 511; 29, 513; 30, 113; 105, 607; 105, 608.

Action by executors, etc.—Generally: Sec. 1452, ante; SUCS. 1460, 1581 et seq., post.

§ 1459. Citation to persons suspected to have embezzled estate, etc. If any executor, administrator, or other person

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interested in the estate of a decedent, complains to the superior court, or a judge thereof, on oath, that any person is suspected to have concealed, embezzled, smuggled, conveyed away, or disposed of any moneys, goods, or chattels of the decedent, or has in his possession or knowledge any deeds, conveyances, bonds, contracts, or other writings, which contain evidences of or tend to disclose the right, title, interest, or claim of the decedent to any real or personal estate, or any claim or demand, or any lost will, the said court or judge may cite such person to appear before such court, and may examine him on oath upon the matter of such complaint. If such person is not in the county where the decedent dies, or where letters have been granted, he may be cited and examined either before the superior court of the county where he is found, or before the superior court of the county where the decedent dies, or where letters have been granted. But if, in the latter case, he appears and is found innocent his necessary expenses must be allowed him out of the estate. En. March 11, 1872. Am'd. 1880, 86.

Cal. Rep. Cit. 61, 154; 71, 269; 71, 271; 71, 272; 72, 24; 94, 349; 100, 364; 105, 604; 105, 608; 105, 613; 105, 614; 105, 618; 116, 451.

Prob. Act, sec. 117. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 105, 607.

§ 1460. Refusal to obey citation, penalty for, and for embezzlement. May be compelled to disclose by imprisonment. Liable for double damages. If the person so cited refuses to appear and submit to an examination, or to answer such interrogatories as may be put to him, touching the matters of the complaint, the court may, by warrant for that purpose, commit him to the county jail, there to remain in close custody until he submits to the order of the court, or is discharged according to law. If, upon such examination, it appears that he has concealed, embezzled, smuggled, conveyed away, or disposed of any moneys, goods or chattels of the decedent, or that he has in his possession or knowledge any deeds, conveyances, bonds, contracts, or other writings containing evidences of or tending to disclose the right, title, interest, or claim of the decedent to any real or personal estate, claim, or

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demand, or any lost will of the decedent, the court may make an order requiring such person to disclose his knowledge thereof to the executor or administrator, and may commit him to the county jail, there to remain until the order is complied with, or he is discharged according to law; and all such interrogatories and answers must be in writing, signed by the party examined, and filed in the court. The order for such disclosure made upon such examination shall be prima facie evidence of the right of the executor or administrator to such property in any action brought for the recovery thereof; and any judgment recovered therein must be for double the value of the property as assessed by the court or jury, or for return of the property and damages in addition thereto, equal to the value of such property. In addition to the examination of the party, witnesses may be produced and examined on either side. En. March 11, 1872. Am'd. 1873-4, 360; 1880, 86.

Cal. Rep. Cit. 71, 271; 71, 272; 94, 349; 98, 643; 105, 604; 105, 605; 105, 608; 105, 613; 105, 614; 105, 618.

Prob. Act, sec. 118. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1860, 357; 1861, 635.

Cal. Rep. Cit. 105, 607.

Contempt: Secs. 1209, 1219.

§ 1461. Persons intrusted with estate of decedent may be cited to account. The superior court, or a judge thereof, upon the complaint, on oath, of any executor or administrator, may cite any person who has been intrusted with any part of the estate of the decedent, to appear before such court, and require him to render a full account, on oath, of any moneys, goods, chattels, bonds, accounts, or other property or papers belonging to the estate, which have come to his possession in trust for the executor or administrator, and of his proceedings thereon; and if the person so cited refuses to appear and render such account, the court may proceed against him as provided in the preceding section. En. March 11, 1872. Am'd. 1880, 87.

Cal. Rep. Cit. 58, 415; 61, 154; 71, 269; 71, 271; 71, 272; 100, 364; 105, 606; 105, 608; 116, 451.

Prob. Act, sec. 119. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 33, 520; 47, 170; 57, 338; 105, 607.

CHAPTER V.

OF THE PROVISION FOR THE SUPPORT OF THE FAMILY, AND
OF THE HOMESTEAD.

Article I. Of the Provision for the Support of the Family, §§ 1464-1470.

II. Of the Homestead, §§ 1474-1486.

ARTICLE I.

OF THE PROVISION FOR THE SUPPORT OF THE FAMILY.

- § 1464. Widow and minor children may remain in decedent's house, etc.
- § 1465. All property exempt from execution to be set apart for use of family.
- § 1466. May make extra allowance.
- § 1467. Payment of allowance.
- § 1468. Property set apart, how apportioned between widow and children.
- § 1469. Administration when estate does not exceed \$1,500.00.
- § 1470. When all property other than homestead to go to children.

§ 1464. Widow and minor children may remain in decedent's house, etc. When a person dies, leaving a widow or minor children, the widow or children, until letters are granted and the inventory is returned, are entitled to remain in possession of the homestead, of all the wearing apparel of the family, and of all the household furniture of the decedent, and are also entitled to a reasonable provision for their support, to be allowed by the superior court, or a judge thereof. En. March 11, 1872. Am'd. 1880, 87.

Cal. Rep. Cit. 83, 325; 100, 170; 100, 598; 106, 430; 106, 432; 117, 512; 119, 137; 131, 4; 140, 152.

Prob. Act, sec. 120. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 29, 513.

§ 1465. All property exempt from execution to be set apart for use of family. Upon the return of the inventory, or at any subsequent time during the administration, the court may, on its own motion, or on petition therefor, set apart for the use of the surviving husband or wife, or, in case of his or her death, to the minor children of the decedent, all the property exempt from execution, including

the homestead selected, designated, and recorded; provided such homestead was selected from the common property, or from the separate property, of the persons selecting or joining in the selection of the same. If none has been selected, designated, and recorded, or in case the homestead was selected by the survivor out of the separate property of the decedent, the decedent not having joined therein, the court must select, designate, and set apart, and cause to be recorded, a homestead for the use of the surviving husband or wife and the minor children; or if there be no surviving husband or wife, then for the use of the minor children, in the manner provided in article two of this chapter, out of the common property, or if there be no common property, then out of the real estate belonging to the decedent. En. March 11, 1872. Am'd. 1880, 87.

Cal. Rep. Cit. 47, 80; 50, 541; 50, 545; 50, 546; 53, 719; 54, 227; 63, 37; 65, 86; 65, 87; 69, 245; 69, 460; 72, 594; 72, 597; 73, 587; 73, 591; 74, 616; 75, 381; 76, 229; 77, 644; 78, 476; 78, 484; 80, 72; 80, 210; 81, 244; 81, 580; 81, 581; 81, 583; 82, 9; 85, 75; 86, 153; 86, 154; 93, 619; 94, 337; 94, 339; 94, 340; 96, 438; 98, 480; 99, 450; 100, 324; 100, 325; 100, 597; 100, 604; 104, 100; 106, 430; 108, 467; 108, 655; 109, 526; 114, 84; 117, 354; 117, 512; 120, 427; 121, 354; 121, 653; 121, 654; 122, 330; 122, 437; 122, 438; 122, 440; 128, 401; 128, 383; 128, 387; 128, 673; 131, 4; 134, 96; 139, 72; 139, 150; 140, 152; 144, 147; 145, 45; 145, 238; 145, 402; 145, 778; 145, 781.

Prob. Act, sec. 121. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 636; 1866, 851; 1868, 172; 1870, 400.

Cal. Rep. Cit. 29, 103; 35, 312; 35, 313; 35, 314; 35, 315; 35, 324; 37, 181; 43, 642; 45, 698.

Appeal from order setting apart homestead or refusing so to do: Ante, sec. 963.

§ 1466. May make extra allowance. If the amount set apart be insufficient for the support of the widow and children, or either, the court or a judge thereof must make such reasonable allowance out of the estate as shall be necessary for the maintenance of the family, according to their circumstances, during the progress of the settlement of the estate, which, in case of an insolvent estate, must not be longer than one year after granting letters testamentary or of administration. En. March 11, 1872. Am'd. 1880, 87.

Cal. Rep. Cit. 57, 459; 60, 650; 67, 350; 73, 583; 73, 587; 73, 589; 77, 644; 93, 619; 96, 438; 100, 170; 100, 325; 100, 602; 100, 603; 100, 605; 106, 430; 106, 432; 108, 467; 114, 79; 117, 512; 122, 438; 122, 440; 128, 383; 131, 4; 131, 292; 145, 560.

Prob. Act, sec. 122. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 636.

Cal. Rep. Cit. 73, 588.

§ 1467. **Payment of allowance.** Any allowance made by the court or judge, in accordance with the provisions of this article, must be paid in preference to all other charges, except funeral charges and expenses of administration; and any such allowance, whenever made, may, in the discretion of the court or judge, take effect from the death of the decedent. En. March 11, 1872.

Cal. Rep. Cit. 52, 577; 57, 459; 73, 583.

Prob. Act, sec. 123. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 636; 1864, 370.

Cal. Rep. Cit. 29, 372.

§ 1468. **Property set apart, how apportioned between widow and children.** When property is set apart to the use of the family, in accordance with the provisions of this chapter, if the decedent left a widow or surviving husband, and no minor child, such property is the property of the widow or surviving husband. If the decedent left also a minor child or children, the one-half of such property shall belong to the widow or surviving husband, and the remainder to the child, or in equal shares to the children, if there be more than one. If there be no widow or surviving husband, the whole belongs to the minor child or children. If the property set apart be a homestead, selected from the separate property of the deceased, the court can only set it apart for a limited period, to be designated in the order, and the title vests in the heirs of the deceased, subject to such order. En. March 11, 1872. Am'd. 1873-4, 361; 1880, 87; 1881, 8.

Cal. Rep. Cit. 50, 542; 65, 87; 73, 593; 73, 594; 74, 617; 80, 73; 81, 580; 82, 10; 86, 153; 86, 154; 93, 293; 93, 294; 94, 337; 94, 338; 94, 339; 94, 340; 96, 438; 100, 170; 104, 100; 108, 653; 114, 87; 120, 427; 120, 428; 121, 268; 121, 655; 128, 673; 139, 72; 139, 150; 139, 151; 141, 648; 144, 146; 144, 654; 145, 240.

Prob. Act, sec. 125. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 29, 104; 29, 372; 35, 323; 35, 324; 43, 642; 43, 643.

Where widow has a maintenance: Post, sec. 1470.

§ 1469. Administration when estate does not exceed \$1,500.00. If, upon the return of the inventory of the estate of a deceased person, it shall appear therefrom that the value of the whole estate does not exceed the sum of fifteen hundred dollars, and if there be a widow or minor children of the deceased, the court, or a judge thereof, shall, by order, require all persons interested to appear on a day fixed, to show cause why the whole of said estate should not be assigned for the use and support of the family of the deceased. Notice thereof shall be given and proceedings had in the same manner as provided in sections one thousand six hundred and thirty-three, one thousand six hundred and thirty-five, and one thousand six hundred and thirty-eight of this code. If, upon the hearing, the court finds that the value of the estate does not exceed the sum of fifteen hundred dollars, it shall, by decree for that purpose, assign to the widow of the deceased, if there be a widow, if no widow, then to the minor children of the deceased, if there be minor children, the whole of the estate, subject to whatever mortgages, liens, or encumbrances there may be upon said estate at the time of the death of the deceased, after the payment of the expenses of the last illness of the deceased, funeral charges, and expenses of administration, and the title thereof shall rest absolutely in such widow or minor children, subject to whatever mortgages, liens, or encumbrances there may be upon said estate at the time of the death of the deceased, and there must be no further proceedings in the administration, unless further estate be discovered. En. March 11, 1872. Am'd. 1875-6, 102; 1880, 88; 1897, 7.

Cal. Rep. Cit. 57, 459; 63, 404; 64, 251; 100, 170; 116, 580; 116, 581; 118, 72; 123, 467; 126, 577; 126, 578; 127, 334; 127, 429; 133, 528; 139, 71; 139, 72; 143, 523.

Prob. Act, sec. 126. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 636.

Cal. Rep. Cit. 29, 372.

Act authorizing next of kin of decedent to collect deposit in bank of less than five hundred dollars: See post, Appendix, title Estates of Deceased Persons.

§ 1470. When all property other than homestead to go to children. If the widow has a maintenance derived from

her own property equal to the portion set apart to her by the preceding sections of this article, the whole property so set apart, other than the homestead, must go to the minor children. En. March 11, 1872. Am'd. 1880, 88.

Prob. Act, sec. 127. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

ARTICLE II.

OF THE HOMESTEAD.

- § 1474. Rights of survivor to homestead.
- § 1475. Selected and recorded homestead set off to person entitled.
Subsisting liens to be paid by solvent estate.
- § 1476. Appraisers to carve out of the original, exceeding five thousand dollars in value, a homestead, and report the same.
- § 1477. Report of the appraisers. Majority and minority, which may be confirmed.
- § 1478. Day to be set for confirming or rejecting the report of the appraisers. Appeal.
- § 1479. If report rejected, other appraisers appointed. If again rejected, partition suit to be brought. (Repealed.)
- § 1480. Instead of dividing the homestead, who may take a deed thereof at appraised value. (Repealed.)
- § 1481. If no homestead is selected and recorded prior to death of decedent, one may be petitioned for. (Repealed.)
- § 1482. Court to direct partition suit in the district court, when. Proceedings thereon. (Repealed.)
- § 1483. If property is common or separate, court to cause appraisement and admeasurement to be made. (Repealed.)
- § 1484. New appraisement, when ordered. Instead of deeding property at appraised value, public sale to be ordered when. (Repealed.)
- § 1485. Costs, to whom chargeable. Persons succeeding to rights of homestead owners have all their powers and rights.
- § 1486. Certified copies of certain orders to be recorded.

§ 1474. Rights of survivor to homestead. If the homestead selected by the husband and wife, or either of them, during their coverture, and recorded while both were living, was selected from the community property, or from the separate property of the person selecting or joining in the selection of the same, it vests, on the death of the husband or wife, absolutely in the survivor. If the homestead was selected from the separate property of either the husband or the wife, without his or her consent, it vests, on the death of the person from whose property it was selected, in his or her heirs, subject to the power of the superior court to assign it for a limited period to the family of the

decedent. In either case it is not subject to the payment of any debt or liability contracted by or existing against the husband and wife, or either of them, previous to or at the time of the death of such husband or wife, except as provided in the Civil Code. En. March 11, 1872. Am'd. 1873-4, 362; 1880, 88.

Cal. Rep. Cit. 50, 543; 52, 297; 52, 298; 76, 641; 79, 11; 80, 209; 81, 243; 81, 580; 82, 10; 83, 442; 85, 621; 86, 153; 92, 371; 92, 372; 94, 339; 95, 403; 95, 406; 95, 407; 102, 341; 108, 654; 113, 31; 117, 409; 118, 300; 119, 666; 121, 653; 121, 654; 132, 611; 132, 613; 139, 72; 139, 151; 142, 474; 144, 619; 144, 653; 144, 655; 146, 107; 146, 431.

Homestead—Generally, and setting apart: Ante, sec. 1465.

§ 1475. Selected and recorded homestead set off to person entitled. Subsisting liens to be paid by solvent estate. If the homestead selected and recorded prior to the death of the decedent be returned in the inventory appraised at not exceeding five thousand dollars in value, or was previously appraised as provided in the Civil Code, and such appraised value did not exceed that sum, the superior court must, by order, set it off to the persons in whom title is vested by the preceding section. If there be subsisting liens or encumbrances on the homestead, the claims secured thereby must be presented and allowed as other claims against the estate. If the funds of the estate be adequate to pay all claims against the estate, the claims so secured must be paid out of such funds. If the funds of the estate be not sufficient for that purpose, the claims so secured shall be paid proportionately with other claims allowed, and the liens or encumbrances on the homestead shall only be enforced against the homestead for any deficiency remaining after such payment. En. March 11, 1872. Am'd. 1873-4, 362; 1880, 88.

Cal. Rep. Cit. 54, 228; 62, 26; 64, 78; 65, 87; 72, 547; 79, 10; 79, 11; 80, 209; 81, 580; 83, 442; 83, 443; 83, 444; 86, 122; 86, 350; 99, 507; 99, 508; 106, 204; 109, 67; 109, 68; 109, 69; 109, 428; 109, 429; 112, 266; 121, 653; 127, 277; 132, 428; 136, 527; 142, 476; 144, 664; 146, 107.

§ 1476. Appraisers to carve out of the original, exceeding five thousand dollars in value, a homestead, and report the same. If the homestead, as selected and recorded, be

returned in the inventory appraised at more than five thousand dollars, the appraisers must, before they make their return, ascertain and appraise the value of the homestead at the time the same was selected, and if such value exceeded five thousand dollars, or if the homestead was appraised as provided in the Civil Code, and such appraised value exceeded that sum, the appraisers must determine whether the premises can be divided without material injury, and if they find that they can be thus divided, they must admeasure and set apart to the parties entitled thereto, such portion of the premises, including the dwelling-house, as will amount in value to the sum of five thousand dollars, and make report thereof, giving the metes, bounds, and full description of the portion set apart as a homestead. If the appraisers find that the premises exceeded in value, at the time of their selection, the sum of five thousand dollars, and that they cannot be divided without material injury, they must report such finding, and thereafter the court may make an order for the sale of the premises and the distribution of the proceeds to the parties entitled thereto. En. March 11, 1872. Am'd. 1873-4, 363.

Cal. Rep. Cit. 73, 594; 76, 641; 81, 580; 81, 583; 122, 331; 144, 662; 144, 664.

Appraisement—Generally: Ante, sec. 1444.

§ 1477. Report of the appraisers. Majority and minority, which may be confirmed. Any two of the appraisers concurring may discharge the duties imposed upon the three, and make the report. A dissenting report may be made by the third appraiser. The report must state fully the acts of the appraisers. Both reports may be heard and considered by the court in determining a confirmation or rejection of the majority report, but the minority report must in no case be confirmed. En. March 11, 1872.

Cal. Rep. Cit. 144, 662.

§ 1478. Day to be set for confirming or rejecting the report of the appraisers. Appeal. When the report of the appraisers is filed, the court must set a day for hearing any objections thereto, from anyone interested in the estate. Notice of the hearing must be given for such time, and in such manner as the court may direct. If the court be satisfied that the report is correct, it must be confirmed, otherwise rejected. In case the report is rejected, the court may appoint new appraisers to examine and report upon

the homestead, and similar proceedings may be had for the confirmation or rejection of their report as upon the first report. En. March 11, 1872. Am'd. 1873-4, 363.

Cal. Rep. Cit. 144, 662.

§ 1479. En. March 11, 1872. Rep. 1873-4, 364.

Cal. Rep. Cit. 144, 662.

§ 1480. En. March 11, 1872. Rep. 1873-4, 364.

Cal. Rep. Cit. 99, 451; 144, 662.

§ 1481. En. March 11, 1872. Rep. 1873-4, 364.

Cal. Rep. Cit. 47, 80; 72, 596; 144, 662.

§ 1482. En. March 11, 1872. Rep. 1873-4, 364.

Cal. Rep. Cit. 144, 662.

§ 1483. En. March 11, 1872. Rep. 1873-4, 364.

Cal. Rep. Cit. 144, 662.

§ 1484. En. March 11, 1872. Rep. 1873-4, 364.

Cal. Rep. Cit. 99, 451; 144, 662.

§ 1485. **Costs, to whom chargeable.** Persons succeeding to rights of homestead owners have all their powers and rights. The costs of all proceedings in the superior court provided for in this chapter, must be paid by the estate as expenses of administration. Persons succeeding by purchase or otherwise to the interests, rights, and title of successors to homesteads, or to the right to have homesteads set apart to them, as in this chapter provided, have all the rights and benefits conferred by law on the persons whose interests and rights they acquire. En. March 11, 1872. Am'd. 1880, 89.

Cal. Rep. Cit. 57, 443; 57, 444; 100, 166; 132, 612; 132, 613; 144, 662.

§ 1486. **Certified copies of certain orders to be recorded.** A certified copy of every final order made in pursuance of this article, by which a report is confirmed, property assigned, or sale confirmed, must be recorded in the office of the recorder of the county where the homestead property is situated. En. March 11, 1872.

Cal. Rep. Cit. 144, 662.

Certified copy—Recording: Post, sec. 1719.

CHAPTER VI.

OF CLAIMS AGAINST THE ESTATE.

- § 1490. Notice to creditors. Additional notice.
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- § 1492. Copy and proof of notice to be filed and order made.
- § 1493. Time within which claims against an estate must be presented.
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- § 1495. Superior judge may present claim, and action thereon.
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- § 1497. Approved claims or copies to be filed. Claims secured by liens may be described. Lost claims.
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- § 1509. Liability of executor, etc., for costs.
- § 1510. Claims of executor, etc., against estate.
- § 1511. Executor neglecting to give notice to creditors, to be removed.
- § 1512. Executor to return statement of claims.
- § 1513. Payment of interest-bearing claims.
- § 1514. Proceedings where claimant cannot be found.

§ 1490. Notice to creditors. Additional notice. Every executor or administrator must, immediately after his appointment, cause to be published in some newspaper of the county, if there be one, if not, then in such newspaper as may be designated by the court, a notice to the creditors of the decedent, requiring all persons having claims against him to exhibit them, with the necessary vouchers, to the executor or administrator, at the place of his residence or business, to be specified in the notice. Such notice must be published as often as the judge or court shall direct, but not less than once a week for four weeks. The court or judge may also direct additional notice by publication or posting. In case such executor or administrator resigns, or is removed, before the time expressed in the notice, his

successor must give notice only for the unexpired time allowed for such presentation. En. March 11, 1872.

Cal. Rep. Cit. 59, 43; 67, 639; 79, 12; 88, 33; 105, 668; 111, 458; 111, 542; 119, 450; 127, 153; 141, 108; 147, 110.

Prob. Act, sec. 128. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 636.

Cal. Rep. Cit. 21, 31; 38, 87; 55, 582.

Publication of notice—How often: Post, sec. 1405.

Two months' neglect—To give notice, causes revocation of letters: Post, sec. 1511.

§ 1491. Time expressed in the notice. The time expressed in the notice must be ten months after its first publication when the estate exceeds in value the sum of ten thousand dollars, and four months when it does not. En. March 11, 1872.

Cal. Rep. Cit. 59, 43; 77, 187; 88, 32; 105, 668; 112, 81; 119, 451; 147, 108; 147, 110.

§ 1492. Copy and proof of notice to be filed and order made. After the notice is given, as required by the preceding section, a copy thereof, with the affidavit of due publication, or of publication and posting, must be filed, and upon such affidavit or other testimony to the satisfaction of the court, an order or decree showing that due notice to creditors has been given, and directing that such order or decree be entered in the minutes and recorded, must be made by the court. En. March 11, 1872.

Cal. Rep. Cit. 111, 543; 147, 116.

Prob. Act, sec. 129. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 637.

Affidavit of publication of notice: Post, secs. 2010, 2011.

§ 1493. Time within which claims against an estate must be presented. All claims arising upon contracts, whether the same be due, not due, or contingent, must be presented within the time limited in the notice, and any claim not so presented is barred forever; provided, however, that when it is made to appear by the affidavit of the claimant, to the satisfaction of the court, or a judge thereof, that the claimant had no notice as provided in this chapter, by reason of being out of the state, it may be presented at any time before a decree of distribution

is entered. En. March 11, 1872. Am'd. 1873-4, 364; 1880, 89.

Cal. Rep. Cit. 52, 235; 53, 85; 55, 584; 56, 299; 56, 300; 56, 302; 56, 304; 59, 43; 66, 531; 72, 18; 77, 187; 79, 10; 85, 443; 86, 440; 90, 395; 92, 435; 95, 167; 95, 168; 95, 169; 95, 437; 95, 438; 96, 469; 96, 470; 96, 474; 96, 476; 99, 503; 99, 507; 106, 204; 109, 66; 109, 425; 110, 83; 112, 84; 115, 464; 116, 664; 119, 66; 124, 574; 127, 592; 128, 392; 132, 152; 142, 594.

Prob. Act, sec. 130. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1860, 17.

Cal. Rep. Cit. 18, 427; 18, 430; 24, 497; 24, 501; 34, 264; 42, 497; 42, 506; 43, 494; 45, 436; 96, 469; 96, 470; 96, 476; 142, 475.

Claim—Action none, unless claim presented: Sec. 1500; after rejection: Sec. 1498; pending at death, claim must be presented: Sec. 1502; affidavit: Sec. 1494; allowance or rejection of: Secs. 1496-1498, 1503; contingent: Sec. 1648; executor, action by: Sec. 1510; judgment on: Secs. 1504, 1509; interest on: Secs. 1494, 1513; judge of superior court may present: Sec. 1495; judgment against decedent: Sec. 1505; on mortgage or lien: Sec. 1500; action barred by statute: Secs. 1499, 1501; examination by judge: Sec. 1499; on mortgage, or lien. Sec. 1500; reference of: Sec. 1507; statement of claims: Sec. 1512.

§ 1494. Claims to be sworn to, and when allowed, to bear same interest as judgments. Every claim which is due, when presented to the executor or administrator, must be supported by the affidavit of the claimant, or some one in his behalf, that the amount is justly due, that no payments have been made thereon which are not credited, and that there are no offsets to the same, to the knowledge of the affiant. If the claim be not due when presented, or be contingent, the particulars of such claim must be stated. When the affidavit is made by a person other than the claimant, he must set forth in the affidavit the reason why it is not made by the claimant. The oath may be taken before any officer authorized to administer oaths. The executor or administrator may also require satisfactory vouchers or proofs to be produced in support of the claim. If the estate be insolvent no greater rate of interest shall be allowed upon any claim after the first publication of notice to creditors than is allowed on judg-

ments obtained in the superior court. En. March 11, 1872. Am'd. 1873-4, 365; 1880, 89.

Cal. Rep. Cit. 52, 577; 56, 464; 56, 465; 58, 353; 67, 642; 72, 18; 86, 350; 91, 605; 92, 435; 96, 470; 96, 471; 103, 155; 126, 455; 126, 456; 127, 59; 127, 60; 127, 116; 133, 410; 133, 411; 134, 29; 135, 352; 146, 200.

Prob. Act, sec. 131. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1860, 17; 1861, 637.

Cal. Rep. Cit. 9, 636; 18, 427; 18, 430; 21, 31; 22, 99; 27, 354; 27, 355; 27, 357; 42, 178; 43, 494; 46, 160; 55, 579; 56, 301; 56, 302; 96, 470; 96, 471.

Claim on mortgage or lien: Post, sec. 1500.

Claim paid without affidavit and allowance when allowed executor: See post, sec. 1632.

§ 1495. Superior judge may present claim, and action thereon. Any judge of a superior court may present a claim against the estate of a decedent for allowance to the executor or administrator thereof, and if the executor or administrator allows the claim, he must in writing designate some other judge of the superior court of the same or an adjoining county, who, upon the presentation of such claim to him, is vested with power to allow or reject it, and the judge presenting such claim, in case of its rejection by the executor or administrator, or by such judge as shall have acted upon it, has the same right to sue in a proper court for its recovery as other persons have when their claims against an estate are rejected. En. March 11, 1872. Am'd. 1880, 90.

Cal. Rep. Cit. 120, 651.

§ 1496. Allowance and rejection of claims. When a claim, accompanied by the affidavit required in this chapter, is presented to the executor or administrator, he must indorse thereon his allowance or rejection, with the day and date thereof. If he allow the claim, it must be presented to a judge of the superior court for his approval, who must in the same manner indorse upon it his allowance or rejection. If the executor or administrator, or the judge, refuse or neglect to indorse such allowance or rejection for ten days after the claim has been presented to him, such refusal or neglect may, at the option of the claimant, be deemed equivalent to a rejection on the tenth day; and if the presentation be made by a notary,

the certificate of such notary, under seal, shall be prima facie evidence of such presentation and the date thereof. If the claim be presented to the executor or administrator before the expiration of the time limited for the presentation of claims, the same is presented in time, though acted upon by the executor or administrator, and by the judge, after the expiration of such time. If the claim be payable in a particular kind of money or currency, it shall, if allowed, be payable only in such money or currency. En. March 11, 1872. Am'd. 1873-4, 365; 1880, 90.

Cal. Rep. Cit. 66, 531; 66, 533; 67, 148; 72, 189; 98, 483; 98, 485; 116, 669; 127, 193; 127, 475; 129, 478.

Prob. Act, sec. 132. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 637.

Cal. Rep. Cit. 6, 670; 18, 427; 18, 430; 29, 372; 34, 226.

Judge may approve claims in chambers: Ante, sec. 166.

§ 1497. Approved claims or copies to be filed. Claims secured by liens may be described. Lost claims. Every claim allowed by the executor or administrator, and approved by a judge of the superior court, or a copy thereof, as hereinafter provided, must, within thirty days thereafter, be filed in the court, and be ranked among the acknowledged debts of the estate, to be paid in due course of administration. If the claim be founded on a bond, bill, note, or any other instrument, a copy of such instrument must accompany the claim, and the original instrument must be exhibited, if demanded, unless it be lost or destroyed, in which case the claimant must accompany his claim by his affidavit, containing a copy or particular description of such instrument, and stating its loss or destruction. If the claim, or any part thereof, be secured by a mortgage, or other lien which has been recorded in the office of the recorder of the county in which the land affected by it lies, it shall be sufficient to describe the mortgage or lien, and refer to the date, volume, and page of its record. If, in any case, the claimant has left any original voucher in the hands of the executor or administrator, or suffered the same to be filed in court, he may withdraw the same when a copy thereof has been already, or is then, attached to his claim. A brief description of every claim filed must be entered by the clerk in the register, showing the name of the claimant, the amount and character of the claim, rate of interest, and date of allowance. En. March 11, 1872. Am'd. 1880, 90.

Cal. Rep. Cit. 51, 217; 52, 577; 62, 415; 67, 180; 72, 489; 82, 99; 85, 141; 86, 326; 96, 475; 109, 357; 112, 79; 125, 362; 128, 392; 133, 299; 135, 352; 146, 193.

Prob. Act, sec. 133. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1860, 18; 1861, 638.

Cal. Rep. Cit. 9, 636; 18, 428; 21, 29; 21, 31; 24, 501; 27, 355; 27, 356; 29, 380; 46, 161; 46, 316.

Claims secured by mortgage, etc.: Post, sec. 1500.

§ 1498. Rejected claims to be sued for within three months. When a claim is rejected either by the executor or administrator, or a judge of the superior court, the holder must bring suit in the proper court against the executor or administrator within three months after the date of its rejection, if it be then due, or within two months after it becomes due, otherwise the claim shall be forever barred. En. March 11, 1872. Am'd. 1880, 91.

Cal. Rep. Cit. 67, 148; 67, 640; 79, 275; 79, 277; 93, 170; 96, 470; 98, 485; 98, 486; 108, 292; 115, 464; 116, 654; 116, 666; 124, 574; 127, 116; 127, 193; 127, 460; 129, 478; 129, 479; 132, 457; 132, 458; 133, 300; 133, 301; 136, 13; 145, 524; 145, 525.

Prob. Act, sec. 134. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 18, 428; 18, 430; 21, 29; 34, 226; 96, 470.

Time for bringing suit: Post, sec. 1501.

Statute of limitations, generally: Ante, secs. 335-363; vacancy in administration does not affect: Post, sec. 1501.

Time for bringing action after death: Ante, sec. 353.

§1499 and whom judge may examine. No claim must be allowed by the executor or administrator, or by a judge of the superior court, which is barred by the statute of limitations. When a claim is presented to a judge for his allowance, he may, in his discretion, examine the claimant and others on oath, and hear any legal evidence touching the validity of the claim. En. March 11, 1872. Am'd. 1880, 91.

Am'd.
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Cal. Rep. Cit. 66, 190; 66, 531; 66, 532; 77, 187; 110, 84; 126, 456; 127, 193; 127, 592; 128, 338; 132, 454; 133, 407.

Prob. Act, sec. 135. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1864, 370.

Cal. Rep. Cit. 2, 386; 18, 428; 56, 302.

§ 1500. Claims must be presented before suit. No holder of any claim against an estate shall maintain any action thereon, unless the claim is first presented to the executor or administrator, except in the following case: An action may be brought by any holder of a mortgage or lien to enforce the same against the property of the estate subject thereto, where all recourse against any other property of the estate is expressly waived in the complaint, but no counsel fees shall be recovered in such action unless such claim be so presented. En. March 11, 1872. Am'd. 1873-4, 366; 1875-6, 103.

Cal. Rep. Cit. 52, 235; 56, 299; 56, 302; 56, 303; 56, 304; 57, 408; 62, 26; 65, 575; 66, 531; 67, 180; 77, 56; 77, 187; 79, 10; 79, 12; 79, 410; 82, 99; 83, 443; 85, 443; 86, 327; 90, 395; 90, 396; 95, 167; 95, 437; 95, 438; 96, 469; 96, 473; 98, 486; 99, 507; 99, 508; 99, 509; 100, 553; 105, 47; 106, 204; 106, 205; 109, 67; 109, 68; 109, 69; 110, 83; 110, 338; 112, 78; 116, 357; 119, 66; 119, 67; 121, 656; 124, 231; 124, 574; 125, 361; 127, 54; 127, 192; 127, 277; 129, 478; 131, 673; 132, 602; 133, 95; 133, 98; 135, 352; 136, 13; 146, 656.

Prob. Act, sec. 136. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 6, 393; 18, 428; 21, 29; 24, 501.

With respect to encumbrances upon the homestead: See sec. 1475, ante.

§ 1501. Time of limitation. The time during which there shall be a vacancy in the administration must not be included in any limitations herein prescribed. En. March 11, 1872.

Cal. Rep. Cit. 129, 473.

Prob. Act, sec. 137. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

§ 1502. Claims in action pending at time of decease. If an action is pending against the decedent at the time of his death, the plaintiff must in like manner present his claim to the executor or administrator for allowance or rejection, authenticated as required in other cases; and no recovery shall be had in the action unless proof be made of the presentations required. En. March 11, 1872.

Cal. Rep. Cit. 52, 227; 79, 10; 79, 11; 89, 4; 95, 437; 95, 438; 99, 503; 99, 507; 99, 508; 99, 509; 106, 204; 107, 52; 107, 53; 123, 22; 123, 469; 129, 479; 133, 95; 133, 96; 133, 98.

Prob. Act, sec. 138. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 27, 355; 42, 132; 42, 134; 50, 42.

Effect of judgment against executor: Post, sec. 1504.

§ 1503. Allowance of claim in part. Whenever any claim is presented to an executor or administrator, or to a judge, and he is willing to allow the same in part, he must state in his indorsement the amount he is willing to allow. If the creditor refuse to accept the amount allowed in satisfaction of his claim, he shall recover no costs in any action therefor brought against the executor or administrator, unless he recover a greater amount than that offered to be allowed. En. March 11, 1872. Am'd. 1880, 91.

Cal. Rep. Cit. 85, 142; 112, 83.

Prob. Act, sec. 139. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 9, 636; 21, 31.

§ 1504. Effect of judgment against executor. A judgment rendered against an executor or administrator, upon any claim for money against the estate of his testator or intestate, only establishes the claim in the same manner as if it had been allowed by the executor or administrator and the judge; and the judgment must be that the executor or administrator pay, in due course of administration, the amount ascertained to be due. A certified transcript of the original docket of the judgment must be filed among the papers of the estate in court. No execution must issue upon such judgment, nor shall it create any lien upon the property of the estate, or give to the judgment creditor any priority of payment. En. March 11, 1872. Am'd. 1880, 91.

Cal. Rep. Cit. 52, 227; 70, 185; 74, 567; 88, 647; 93, 17; 121, 638; 124, 222; 132, 511; 133, 301; 133, 304; 138, 305; 138, 306; 141, 16.

Prob. Act, sec. 140. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 6, 413; 9, 127; 9, 136; 21, 30; 29, 363; 29, 366; 29, 368; 29, 373; 32, 397; 34, 226; 38, 87; 38, 378; 46, 315; 46, 317.

§ 1505. Execution not to issue after death. If one is levied the property may be sold. When any judgment has

been rendered for or against the testator, intestate in his lifetime, no execution shall issue thereon after his death, except as provided in section six hundred and eighty-six. A judgment against the decedent for the recovery of money must be presented to the executor or administrator like any other claim. If execution is actually levied upon any property of the decedent before his death, the same may be sold for the satisfaction thereof; and the officer making the sale must account to the executor or administrator for any surplus in his hands. A judgment creditor having a judgment which was rendered against the testator or intestate in his lifetime, may redeem any real estate of the decedent from any sale under foreclosure or execution, in like manner and with like effect as if the judgment debtor were still living. En. March 11, 1872. Am'd. 1873-4, 413.

Cal. Rep. Cit. 65, 519; 86, 121; 86, 122; 99, 582; 124, 230; 138, 259; 138, 304; 138, 305; 138, 306.

Prob. Act, sec. 141. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 638.

Cal. Rep. Cit. 9, 127; 19, 100; 22, 99; 29, 373; 37, 143; 38, 378; 55, 579.

§ 1506. What judgment is not a lien on real property of estate. A judgment rendered against a decedent, dying after verdict or decision on an issue of fact, but before judgment is rendered thereon, is not a lien on the real property of the decedent, but is payable in due course of administration. En. March 11, 1872.

Cal. Rep. Cit. 124, 230; 124, 232.

§ 1507. May refer doubtful claims. Effect of referee's allowance or rejection. If the executor or administrator doubts the correctness of any claim presented to him, he may enter into an agreement, in writing, with the claimant, to refer the matter in controversy to some disinterested person, to be approved by the superior court, or a judge thereof. Upon filing the agreement and approval of such court or judge, in the office of the clerk of the court for the county in which the letters testamentary or of administration were granted, the clerk must enter a minute of the order referring the matter in controversy to the person so selected, or, if the parties consent, a reference may be had in the court; and the report of the referee, if confirmed, establishes or rejects the claim the same as if it

had been allowed or rejected by the executor or administrator and judge. En. March 11, 1872. Am'd. 1880, 91.

Cal. Rep. Cit. 69, 80; 104, 245.

Prob. Act, sec. 142. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 638.

§ 1508. Trial by referee, how confirmed and its effect. The referee must hear and determine the matter, and make his report thereon to the court in which his appointment is entered. The same proceedings shall be had in all respects, and the referee shall have the same powers, be entitled to the same compensation, and subject to the same control, as in other cases of reference. The court may remove the referee, appoint another in his place, set aside or confirm his report, and adjudge costs, as in actions against executors or administrators, and the judgment of the court thereon shall be as valid, and effectual, in all respects, as if the same had been rendered in a suit commenced by ordinary process. En. March 11, 1872.

Cal. Rep. Cit. 104, 246; 104, 247.

Prob. Act, sec. 143. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 639.

Reference: Ante, secs. 638-645.

§ 1509. Liability of executor, etc., for costs. When a judgment is recovered, with costs, against any executor or administrator, he shall be individually liable for such costs, but they must be allowed him in his administration accounts, unless it appears that the suit or proceeding in which the costs were taxed was prosecuted or defended without just cause. En. March 11, 1872.

Cal. Rep. Cit. 93, 572; 99, 479; 103, 253; 126, 371; 128, 337; 128, 338.

Prob. Act, sec. 144. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 46, 233.

§ 1510. Claims of executor, etc., against estate. If the executor or administrator is a creditor of the decedent, his claim duly authenticated by affidavit must be presented for allowance or rejection to a judge of the superior court, and its allowance by the judge is sufficient evidence of its

correctness, and must be paid as other claims in due course of administration. If, however, the judge reject the claim, action thereon may be had against the estate by the claimant, and summons must be served upon the judge, who may appoint an attorney, at the expense of the estate, to defend the action. If the claimant recover no judgment, he must pay all costs, including defendant's reasonable attorney's fees, to be fixed by the court. En. March 11, 1872. Am'd. 1880, 92.

Cal. Rep. Cit. 52, 577; 67, 244; 78, 626; 78, 627; 92, 436; 121, 637; 121, 638; 125, 361; 147, 21; 147, 460.

Prob. Act, sec. 145. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1872, 52.

Cal. Rep. Cit. 21, 31.

Claim: Ante, sec. 1493.

§ 1511. **Executor neglecting to give notice to creditors, to be removed.** If an executor or administrator neglects, for two months after his appointment, to give notice to creditors, as prescribed by this chapter, the court must revoke his letters, and appoint some other person in his stead, equally or the next in order entitled to the appointment. En. March 11, 1872.

Cal. Rep. Cit. 127, 429.

Prob. Act, sec. 146. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

§ 1512. **Executor to return statement of claims.** At the same time at which he is required to return his inventory, the executor or administrator must also return a statement of all claims against the estate which have been presented to him, if so required by the court, or a judge thereof, and from time to time thereafter he must present a statement of claims subsequently presented to him, if so required by the court, or a judge thereof. In all such statements he must designate the names of the creditors, the nature of each claim, when it became due, or will become due, and whether it was allowed or rejected by him. En. March 11, 1872. Am'd. 1880, 92.

Cal. Rep. Cit. 67, 640.

Prob. Act, sec. 147. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 9, 636; 21, 32.

§ 1513. **Payment of interest-bearing claims.** If there be any debt of the decedent bearing interest, whether presented or not, the executor or administrator may, by order of the court, pay the amount then accumulated and unpaid, or any part thereof, at any time when there are sufficient funds properly applicable thereto, whether said claim be then due or not; and interest shall thereupon cease to accrue upon the amount so paid. This section does not apply to existing debts, unless the creditor consent to accept the amount. En. Stats. 1873-4, 366.

Cal. Rep. Cit. 106, 155; 120, 700; 143, 483.

Payment of debts of estate, generally: Post, secs. 1643 et seq.

§ 1514. **Proceedings where claimant cannot be found.** Whenever any claim has been presented to an executor or administrator, and to the court, and has been allowed and approved, but the same shall not have been paid, and the estate is in all other respects ready to be closed, if it be made to appear to the satisfaction of the court or judge, by affidavit, or by testimony taken in open court, that the same cannot be, and has not been, paid because the claimant cannot be found, the court or judge shall make an order fixing the amount of said claim, with interest, if any, and directing the executor or administrator to deposit the amount with the county treasurer of the county in which the estate is being probated, who shall give a receipt for the same, and who shall be liable upon his official bond therefor. Such executor or administrator shall at once make the deposit in accordance with such order of court and shall forthwith proceed to close up and settle such estate. Upon the final settlement of his accounts, the receipt of such treasurer shall be received as a proper voucher for the payment of such claim, and shall have the same force and effect as if executed by such claimant. When the amount so deposited is not claimed within five years the court or judge, upon such showing by the affidavit of the county treasurer, must direct the same to be deposited in the state treasury for the benefit of such claimant, or his legal representative, to be paid to him, whenever, within five years after such deposit, proof to the satisfaction of the state controller and state treasurer is produced that he is entitled thereto. When so claimed, the evidence and the joint order of the controller and treasurer must be filed by the treasurer as his voucher, and the

amount of the claim paid to the claimant, or his legal representative, on filing the proper receipt. If no one claims the amount, as herein provided, the claim devolves and escheats to people of the state of California and shall be placed by the state treasurer to the credit of the school fund. This section shall be applicable to any and all estates now pending in which a decree of final discharge has not been granted. En. Stats. 1903, 203.

Cal. Rep. Cit. 65, 518.

CHAPTER VII.

OF SALES AND CONVEYANCES OF PROPERTY OF DECEDENTS.

Article I. Sales in General, §§ 1516-1519.

II. Sales of Personal Property, §§ 1522-1526.

III. Summary Sales of Mines and Mining Interests, §§ 1529-1533.

IV. Sales of Real Estate, Interests Therein, and Confirmation Thereof, §§ 1536-1576.

V. Mortgages and Leases of Real Estate, §§ 1577-1579.

ARTICLE I.

SALES IN GENERAL.

§ 1516. Estate chargeable with debts. No priority.

§ 1517. No sales valid except by order of superior court.

§ 1518. Petitions for orders of sale.

§ 1519. But one petition, order, and sale must be had when it is possible to do so.

§ 1516. Estate chargeable with debts. No priority. All the property of a decedent shall be chargeable with the payment of the debts of the deceased, the expenses of administration, and the allowance to the family, except as otherwise provided in this code, and in the Civil Code. And the said property, personal and real, may be sold as the court may direct, in the manner prescribed in this chapter. There shall be no priority as between personal and real property for the above purposes. En. March 11, 1872. Am'd. 1873-4, 367.

Cal. Rep. Cit. 57, 459; 67, 639; 120, 92; 131, 119; 142, 456.

Prob. Act, sec. 115. En. April 22, 1850. Rep. 1851, 489.

En. 1851, 448.

Cal. Rep. Cit. 20, 313; 31, 616.

All property chargeable for debts, etc.: Civ. Code, sec. 1358; order of appropriation: Civ. Code, sec. 1359; and see secs. 1560-1564, post.

Personal and real property, appropriated without distinction: Post, sec. 1563.

Sold as the court may direct: Post, sec. 1517.

A contract for the purchase of real estate may be sold: Post, secs. 1565 et seq.

Sale, executor, etc., cannot buy at, or be interested in: Post, sec. 1576.

§ 1517. No sales valid except by order of superior court. No sale of any property of an estate of a decedent is valid unless made under order of the superior court, except as otherwise provided in this chapter. All sales must be under oath reported to and confirmed by the court before the title to the property sold passes. En. March 11, 1872. Am'd. 1880, 92.

Cal. Rep. Cit. 49, 495; 50, 99; 63, 18; 104, 412; 114, 660; 115, 33; 115, 205; 131, 164; 144, 126.

Prob. Act, sec. 148. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 639.

Cal. Rep. Cit. 9, 127; 18, 303; 21, 29; 21, 44.

Valid sales, where property is mortgaged: Post, sec. 1569.

§ 1518. Petitions for orders of sale. All petitions for orders of sale must be in writing, setting forth the facts showing the sale to be necessary, and, upon the hearing, any person interested in the estate may file his written objections, which must be heard and determined. A failure to set forth the facts showing the sale to be necessary will not invalidate the subsequent proceedings, if the defect be supplied by the proofs at the hearing, and the general facts showing the necessity be stated in the order directing the sale. En. March 11, 1872. Am'd. 1873-4, 367.

Prob. Act, sec. 149. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 9, 636.

§ 1519. But one petition, order, and sale must be had when it is possible to do so. When it appears to the court that the estate is insolvent, or that it will require a sale of all the property of the estate of every character, to pay the family allowance, expenses of administration, and debts, there need be but one petition filed, but one order of sale made, and but one sale had, except in the case of

perishable property, which may be sold as provided in section fifteen hundred and twenty-two. The court, when a petition for the sale of any property for any of the purposes herein named is presented, must inquire fully into the probable amount required to make all such payments, and if there be no more estate than sufficient to pay the same, may require but one proceeding for the sale of the entire estate. In such case the petition must set forth substantially the facts required by section fifteen hundred and thirty-seven. En. March 11, 1872. Am'd. 1873-4, 367; 1880, 92.

Cal. Rep. Cit. 57, 459.

Orders, generally, in probate matters: Post, sec. 1704.

One petition for realty, sale of personalty on: Post, secs. 1536, 1639.

ARTICLE II.

SALES OF PERSONAL PROPERTY.

- § 1522. Perishable and depreciating property to be sold.
- § 1523. Order to sell personal property.
- § 1524. Partnership interests and choses in action, how sold.
- § 1525. Order of sale, what to direct and what to be first sold.
- § 1526. Sale of personal property.
- § 1527. Sale of personal property.

§ 1522. Perishable and depreciating property to be sold. At any time after receiving letters, the executor, administrator, or special administrator may apply to the court or judge and obtain an order to sell perishable and other personal property likely to depreciate in value, or which will incur loss or expense by being kept, and so much other personal property as may be necessary to pay the allowance made to the family of the decedent. The order for the sale may be made without notice; but the executor, administrator, or special administrator is responsible for the property, unless, after making a sworn return and on a proper showing, the court shall approve the sale. En. March 11, 1872.

Cal. Rep. Cit. 57, 459; 106, 433; 129, 89.

Prob. Act, sec. 150. En. April 22, 1850. Rep. 1851, 439. En. 1851, 448. Am'd. 1860, 175; 1861, 639.

Cal. Rep. Cit. 9, 636; 21, 32.

Petition: Ante, sec. 1518.

Order for the sale: Post, sec. 1525.

§ 1523. Order to sell personal property. If claims against the estate have been allowed, and a sale of property is necessary for their payment, or for the expenses of administration, or for the payment of legacies, the executor or administrator may apply for an order to sell so much of the personal property as may be necessary therefor. Upon filing his petition, notice of at least five days must be given of the hearing of the application, either by posting notices or by advertising. He may also make a similar application from time to time, so long as any personal property remains in his hands, and sale thereof is necessary. If it appear for the best interests of the estate, he may, at any time after filing the inventory, in like manner, and after giving like notice, apply for and obtain an order to sell the whole of the personal property belonging to the estate, whether necessary to pay debts or not. En. March 11, 1872. Am'd. 1873-4, 368; 1880, 93.

Cal. Rep. Cit. 57, 459.

Notice by advertising: Post, sec. 1705.

§ 1524. Partnership interests and choses in action, how sold. Partnership interests or interests belonging to any estate by virtue of any partnership formerly existing, interest in personal property pledged, and choses in action, may be sold in the same manner as other personal property, when it appears to be for the best interest of the estate. Before confirming the sale of any partnership interest, whether made to the surviving partner or to any other person, the court or judge must carefully inquire into the condition of the partnership affairs, and must examine the surviving partner, if in the county and able to be present in court. En. March 11, 1872.

Cal. Rep. Cit. 104, 412; 114, 661; 131, 164.

Partnership interest: Post, sec. 1585.

§ 1525. Order of sale, what to direct and what to be first sold. If it appear that a sale is necessary for the payment of debts or the family allowance, or for the best interest of the estate and the persons interested in the property to be sold, whether it is or is not necessary to pay the debts or family allowance, the court or judge must order it to be made. In making orders and sales for the payment of debts or family allowance, such articles as are

not necessary for the support and subsistence of the family of the decedent, or are not specially bequeathed, must be first sold, and the court or judge must so direct. En. March 11, 1872. Am'd. 1873-4, 368.

Cal. Rep. Cit. 57, 459.

Prob. Act, sec. 151. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1860, 175; 1861, 639.

Cal. Rep. Cit. 48, 193.

§ 1526. **Sale of personal property.** The sale of personal property must be made at public auction for such money or currency as the court may direct, and after public notice given for at least ten days by notices posted in three public places in the county, or by publication in a newspaper, or both, containing the time and place of sale, and a brief description of the property to be sold, unless for good reason shown the court, or a judge thereof, orders a private sale or a shorter notice. Public sales of such property must be made at the courthouse door, or at the residence of the decedent, or at some other public place; but no sale shall be made of any personal property which is not present at the time of sale, unless the court otherwise order. En. March 11, 1872. Am'd. 1873-4, 369; 1880, 93.

Prob. Act, sec. 152. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1855, 299; 1861, 640.

Prob. Act, sec. 153. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 640.

§ 1527. **Sale of personal property of deceased person.** Whenever it appears to the court on any hearing of an application for a sale of real property, that it would be for the interest of the estate that personal property of the estate, or some part of such property, should first be sold, the court may decree the sale of said personal property, or any part of it, and the sale thereof shall be conducted in the same manner as if the application had been made for the sale of such personal property in the first instance. En. 1905, 242.

Cal. Rep. Cit. 104, 111.

By some unaccountable mistake the present section 1639, which concerns sales of personal property, is placed in the wrong chapter, to wit: that entitled "Accounting and Settlement by Executors and Administrators." It is, therefore, repealed, and a new section, 1527, containing exactly the same provisions as the old section 1639, is inserted in the proper chapter, to wit: that concerning "Sales of Personal Property."—Code Commissioner's Note.

ARTICLE III.

SUMMARY SALES OF MINES AND MINING INTERESTS.

- § 1529. Mines may be sold, how.
§ 1530. Petition for sale, who may file and what to contain.
§ 1531. Order to show cause, how made and on what notice.
§ 1532. Order of sale, when and how made.
§ 1533. Further proceedings to conform to articles two and four.

§ 1529. Mines may be sold, how. When it appears from the inventory of the estate of any decedent that his estate consists in whole or in part of mines, or interests in mines, such mines or interests may be sold under the order of the court having jurisdiction of the estate, as hereinafter provided. En. March 11, 1872. Am'd. 1880, 93.

Cal. Rep. Cit. 83, 349; 112, 178; 116, 581.

§ 1530. Petition for sale, who may file and what to contain. The executor or administrator, or any heir at law, or creditor of the estate, or any partner or member of any mining company, in which interests or shares are held or owned by the estate, may file in the court a petition, in writing, setting forth the general facts of the estate being then in due course of administration, and particularly describing the mine, interest, or shares which it is desired to sell, and particularly the condition and situation of the mines or mining interests, or of the mining company in which such interests or shares are held, and the grounds upon which the sale is asked to be made. En. March 11, 1872. Am'd. 1880, 93.

Cal. Rep. Cit. 55, 314; 83, 349; 138, 302.

Petition for sale, generally: Ante, sec. 1518.

§ 1531. Order to show cause, how made and on what notice. Upon the presentation of such petition, the court, or a judge thereof, must make an order directing all persons interested to appear before such court, at a time and place specified, not less than four or more than ten weeks from the time of making such order, to show cause why an order should not be granted to the executor or administrator to sell such mine, mining interests, shares, or stocks, as are set forth in the petition and belonging to the estate. A copy of the order to show cause must be

personally served on all persons interested in the estate, at least ten days before the time appointed for hearing the petition, or published at least four successive weeks in such newspaper as such court or judge shall specify. If all persons interested in the estate signify in writing their assent to such sale, the notice may be dispensed with. En. March 11, 1872. Am'd. 1880, 94.

Publication of notice: Post, sec. 1705.

§ 1532. Order of sale, when and how made. If, upon hearing the petition, it appears to the satisfaction of the court that it is to the interest of the estate that such mining property or interests of the estate should be sold, or that an immediate sale is necessary in order to secure the just rights or interests of the mining partners, or tenants in common, such court must make an order authorizing the executor or administrator to sell such mining interests, mines, or shares, as hereinafter provided. En. March 11, 1872. Am'd. 1880, 94.

§ 1533. Further proceedings to conform to articles two and four. After the order of sale is made, all further proceedings for the sale of such mining property, and for the notice, report, and confirmation thereof, must be in conformity with the provisions of article four of this chapter. En. March 11, 1872.

Cal. Rep. Cit. 83, 349; 112, 178.

ARTICLE IV.

THE SALE OF REAL ESTATE, INTERESTS THEREIN, AND CONFIRMATION THEREOF.

- § 1536. When executor or administrator may sell property.
- 1537. Verified petition for sale, what to contain.
- 1538. Order to persons interested to appear.
- 1539. Copy to be served, assent given, or publication made.
- 1540. Hearing after proof of service. Presentation of claims.
- 1541. Administrator, executor, and witnesses may be examined.
- 1542. To sell real estate or any part, when.
- 1543. Order of sale, when to be made.
- § 1544. What the order of sale must contain. May be at public or private sale.
- § 1545. Interested persons may apply for order of sale. Form of petition.
- § 1546. To deliver copy of order to executor. (Repealed.)
- 1547. Notice of sale.
- 1548. Time and place.
- § 1549. Private sale of real estate, how made, and notice. Bids, when and how received.
- § 1550. Ninety per cent of appraised value must be offered.
- 1551. Purchase money on sale on credit, how secured.
- § 1552. Return of proceedings and hearing. Setting aside sale. Re-sale.
- § 1553. May file objections, when and who.
- 1554. When order of confirmation is to be made and when not.
- 1555. Conveyances.
- 1556. Order of confirmation, what to state.
- 1557. Sale may be postponed.
- 1558. Notice of postponement.
- 1559. Sale of real estate to pay legacies. (Repealed.)
- 1560. Where payment of debts, etc., provided for by will.
- 1561. Sale without order.
- 1562. Where provision by will insufficient.
- 1563. Estate subject to debts, etc.
- 1564. Contribution among legatees.
- 1565. Contract for purchase of lands may be sold, how.
- 1566. Conditions of sale.
- 1567. Purchaser to give bond.
- 1568. Executor to assign contract.
- § 1569. Sales by executors or administrators of lands under mortgage or lien.
- § 1570. The holder of the mortgage or lien may purchase the lands. His receipt to the amount of his claim a valid payment.
- § 1571. Administrator and executor liable for misconduct in sale.
- 1572. Fraudulent sales.
- 1573. Limitation of actions for vacating sale, etc.
- 1574. To what cases preceding section not to apply.
- 1575. Account of sale to be returned.
- § 1576. Executor, etc., not to be purchaser.

§ 1536. When executor or administrator may sell property. When a sale of property of the estate is necessary to pay the allowance of the family, or the debts outstanding against the decedent, or the debts, expenses, or charges

of administration or legacies; or when it appears to the satisfaction of the court that it is for the advantage, benefit, and best interests of the estate, and those interested therein that the real estate, or some part thereof, be sold, the executor or administrator may sell any real as well as personal property of the estate upon the order of the court; and an application for the sale of real property may also embrace the sale of personal property. En. March 11, 1872. Am'd. 1873-4, 369; 1880, 94; 1893, 212.

Cal. Rep. Cit. 57, 459; 83, 349; 87, 482; 88, 584; 88, 588; 112, 178; 120, 92; 129, 87; 131, 670; 142, 379; 144, 668.

Prob. Act, sec. 154. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 640.

Cal. Rep. Cit. 13, 576; 16, 500; 20, 124; 20, 313; 22, 275; 36, 690; 48, 193; 50, 406; 55, 582; 139, 19.

Sale of realty, authorized: Ante, sec. 1516; interest under contracts may be included: Post, sec. 1565; additional bond on: Ante, sec. 1389.

§ 1537. Verified petition for sale, what to contain. To obtain such order for the sale of real property, he must present a verified petition to the superior court, or a judge thereof, setting forth the amount of the personal estate that has come to his hands and how much thereof, if any, remains undisposed of; the debts outstanding against the decedent, as far as can be ascertained or estimated; the amount due upon the family allowance or that will be due after the same has been in force for one year; the debts, expenses, and charges of administration already accrued, and an estimate of what will or may accrue during the administration; a general description of all the real property of which the decedent died seised, or in which he had any interest, or in which the estate has acquired any interest, and the condition and value thereof, and whether the same be community or separate property; the names of the legatees and devisees, if any, and the heirs of the deceased, so far as known to the petitioner; and if said order for sale of real estate is petitioned for on the ground that it is for the advantage, benefit, and best interests of the estate and those interested therein that a sale be made, the petition, in addition to the foregoing facts, must set forth in what way an advantage or benefit would accrue to the estate and those interested therein by such sale. If any of the matters herein enumerated cannot be ascer-

tained, it must be so stated in the petition; but a failure to set forth facts hereinbefore enumerated will not invalidate the subsequent proceedings if the defect be supplied by the proofs at the hearing and the general facts showing that such sale is necessary or that such sale is for the advantage, benefit, and best interests of the estate and those interested therein be stated in the decree. En. March 11, 1872. Am'd. 1873-4, 370; 1880, 94; 1893, 212.

Cal. Rep. Cit. 51, 565; 55, 314; 55, 315; 63, 17; 63, 18; 63, 347; 66, 389; 78, 599; 78, 600; 82, 176; 82, 549; 83, 346; 83, 349; 83, 351; 83, 355; 83, 356; 85, 152; 96, 667; 108, 339; 112, 178; 112, 180; 112, 268; 120, 424; 120, 425; 120, 611; 125, 257; 125, 397; 127, 458; 131, 119; 131, 670; 137, 185; 137, 186; 137, 187; 137, 188; 137, 189; 141, 641; 141, 642; 142, 379.

Prob. Act, sec. 155. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 640.

Cal. Rep. Cit. 13, 576; 16, 500; 19, 410; 20, 124; 20, 313; 20, 314; 33, 665; 36, 690; 36, 691; 50, 406; 54, 197; 139, 19; 139, 20.

Petition: Sec. 1518. If executor omits to apply, any other person may: Sec. 1545; stating facts in order: Post, sec. 1704.

Return of sale: Ante, sec. 1517.

Summary sale of mine: Ante, secs. 1529 et seq.

§ 1538. Order to persons interested to appear. If it appears to the court or judge, from such petition, that it is necessary, or that it would be for the advantage, benefit, and best interests of the estate and those interested therein, to sell the whole or some portion of the real estate for the purposes and reasons mentioned in the preceding section or any of them, such petition must be filed, and an order thereupon made directing all persons interested in the estate to appear before the court, at a time and place specified, not less than four nor more than ten weeks from the time of making such order, to show cause why an order should not be granted to the executor or administrator for the sale of such estate. En. March 11, 1872. Am'd. 1893, 213.

Cal. Rep. Cit. 122, 41; 122, 49; 125, 257; 125, 397; 139, 20; 139, 21.

Prob. Act, sec. 156. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 641.

Cal. Rep. Cit. 13, 576; 16, 500; 16, 502; 16, 503; 20, 124; 20, 313; 36, 690; 139, 20.

§ 1539. Copy to be served, assent given, or publication made. A copy of the order to show cause must be personally served on all persons interested in the estate, any general guardian of a minor so interested, and any legatee, or devisee, or heir of the decedent, provided they are residents of the county, at least ten days before the time appointed for hearing the petition, or be published four successive weeks in such newspaper in the county as the court or judge shall direct. If all persons interested in the estate join in the petition for the sale, or signify in writing their assent thereto, the notice may be dispensed with, and the hearing may be had at any time. En. March 11, 1872. Am'd. 1873-4, 370.

Cal. Rep. Cit. 84, 446; 100, 402; 122, 41; 122, 49; 125, 257.

Prob. Act, sec. 157. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 641.

Cal. Rep. Cit. 20, 124; 33, 54; 139, 21.

Prob. Act, sec. 159. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 641.

Cal. Rep. Cit. 16, 503; 33, 52; 43, 547; 54, 197; 97, 366.

Notice, personal service of: See ante, sec. 1011; post, secs. 1707-1709, 1710; publication of: Post, sec. 1705.

Guardian when infant a party: Ante, secs. 372, 373; post, secs. 1722, 1769.

§ 1540. Hearing after proof of service. Presentation of claims. The court, at the time and place appointed in such order, or at such other time to which the hearing may be postponed, upon satisfactory proof of personal service or publication of a copy of the order, by affidavit or otherwise, if the consent in writing to such sale of all parties interested is not filed, must proceed to hear the petition, and hear and examine the allegations and proofs of the petitioners, and of all persons interested in the estate who may oppose the application. All claims against the decedent not before presented, if the period of presentation has not elapsed, may be presented and passed upon at the hearing. En. March 11, 1872. Am'd. 1880, 95.

Cal. Rep. Cit. 62, 415; 84, 446.

Prob. Act, sec. 158. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 641.

Cal. Rep. Cit. 20, 124.

§ 1541. Administrator, executor, and witnesses may be examined. The executor, administrator, and witnesses may be examined on oath by either party, and process to compel them to attend and testify may be issued by the court or judge, in the same manner and with like effect as in other cases. En. March 11, 1872. Am'd. 1880, 95.

Prob. Act, sec. 160. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Procuring attendance, etc.: Post, secs. 1985 et seq.

§ 1542. To sell real estate or any part, when. If it appears to the satisfaction of the court, or a judge thereof, that it is necessary, or that it is for the advantage, benefit, and best interests of the estate and those interested therein, to sell a part of the real estate, and that by a sale thereof the residue of the estate, real and personal, or some specific part thereof, would be greatly injured or diminished in value, or subjected to expense, or rendered unprofitable, or that after any such sale the residue would be so small in quantity or value, or would be of such a character with reference to its future disposition among their heirs or devisees, as clearly to render it for the best interests of all concerned that the same should be sold, the court may authorize the sale of the whole estate or any part thereof, as in the judgment of the court is necessary, or for the advantage, benefit, and best interests of the estate and those interested therein. En. March 11, 1872. Am'd. 1893, 213.

Cal. Rep. Cit. 57, 459; 125, 397; 138, 201; 142, 379; 142, 380.

Prob. Act, sec. 161. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 642; 1866, 766.

§ 1543. Order of sale, when to be made. If it appears to the satisfaction of the court, after a full hearing upon the petition and an examination of the proofs and allegations of the parties interested, that a sale of the whole or some portion of the real estate is necessary for any of the causes mentioned in this article, or that a sale of the whole or some portion of the real estate is for the advantage, benefit, and best interests of the estate and those interested therein, or if such sale be assented to by all the persons interested, an order must be made to sell the whole, or so much and such parts of the real estate described in the

petition as the court shall judge necessary, or for the advantage, benefit, and best interests of the estate and those interested therein. En. March 11, 1872. Am'd. 1893, 213.

Cal. Rep. Cit. 57, 423; 84, 446; 125, 397; 132, 48; 142, 379; 144, 127.

Prob. Act, sec. 162. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 642.

Cal. Rep. Cit. 20, 124; 36, 690.

Order, need not recite facts: Post, sec. 1704.

Personal estate: See, as to ordering a sale of personalty on application for sale of realty: Post, sec. 1639.

§ 1544. What the order of sale must contain. May be at public or private sale. The order of sale must describe the lands to be sold and the terms of sale, which may be for cash, or on credit not exceeding one year, payable in gross or in installments, and in such kind of money, with interest, as the court may direct. The land may be sold in one parcel or in subdivisions, as the executor or administrator shall judge most beneficial to the estate, unless the court otherwise specially directs. If it appears that any part of such real estate has been devised, and not charged in such devise with the payment of debts or legacies, the court must order the remainder to be sold before that so devised. Every such sale must be ordered to be made at public auction, unless, in the opinion of the court, it would benefit the estate to sell the whole or some part of such real estate at private sale; the court may, if the same is asked for in the petition, order or direct such real estate, or any part thereof, to be sold at either public or private sale, as the executor or administrator shall judge to be most beneficial for the estate. If the executor or administrator neglects or refuses to make a sale under the order, and as directed therein, he may be compelled to sell, by order of the court, made on motion, after due notice, by any party interested. En. March 11, 1872.

Cal. Rep. Cit. 56, 209; 57, 459; 66, 132; 75, 260; 120, 425; 125, 397; 127, 277.

Prob. Act, sec. 163. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 642.

Cal. Rep. Cit. 20, 124; 31, 606; 31, 616; 31, 618.

Contents of order: Post, sec. 1704.

§ 1545. Interested persons may apply for order of sale. **Form of petition.** If the executor or administrator neglects or refuses to apply for an order of sale when it is necessary, or when it is for the advantage, benefit and best interests of the estate and those interested therein that the real estate or some portion thereof be sold, any person interested may make application therefor in the same manner as the executor or administrator, and notice thereof must be given to the executor or administrator before the hearing. The petition of such applicant must contain as many of the matters set forth in section one thousand five hundred and thirty-seven as he can ascertain, and the decree of sale must fix the period of time within which the executor or administrator must make the sale. En. March 11, 1872. Am'd. 1893, 214.

Cal. Rep. Cit. 87, 482.

Prob. Act, sec. 164. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 642.

Cal. Rep. Cit. 55, 582.

§ 1546. To deliver copy of order to executor. En. March 11, 1872. Rep. 1873-4, 371.

Prob. Act, sec. 165. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 643.

§ 1547. Notice of sale. When a sale is ordered, and is to be made at public auction, notice of the time and place of sale must be posted in three of the most public places in the county in which the land is situated, and published in a newspaper, if there be one printed in the same county, but if none, then in such paper as the court may direct, for three weeks successively next before the sale. The lands and tenements to be sold must be described with common certainty in the notice. En. March 11, 1872.

Cal. Rep. Cit. 73, 558; 84, 446.

Prob. Act, sec. 166. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1866, 766.

§ 1548. Time and place. Sales at public auction must be made in the county where the land is situated; but when the land is situated in two or more counties it may be sold in either. The sale must be made between the hours of nine o'clock in the morning and the setting of

the sun on the same day, and must be made on the day named in the notice of sale, unless the same is postponed. En. March 11, 1872.

Prob. Act, sec. 167. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 643; 1864, 370; 1866, 766.

Postponement of sale: Post, secs. 1557, 1558.

§ 1549. Private sale of real estate, how made, and notice. Bids, when and how received. When a sale of real estate is ordered to be made at private sale, notice of the same must be posted up in three of the most public places in the county in which the land is situated, and published in a newspaper, if there be one printed in the same county, if none, then in such paper as the court or a judge thereof may direct, for two weeks successively next before the day on or after which the sale is to be made, in which the lands and tenements to be sold must be described with common certainty. The notice must state a day on or after which the sale will be made, and a place where offers or bids will be received. The day last referred to must be at least fifteen days from the first publication of notice; and the sale must not be made before that day, but must be made within six months thereafter. The bids or offers must be in writing, and may be left at the place designated in the notice, or delivered to the executor or administrator personally, or may be filed in the office of the clerk of the court to which the return of sale must be made, at any time after the first publication of the notice and before the making of the sale. If it be shown that it will be for the best interest of the estate, the court or judge may, by an order, shorten the time of notice, which shall not, however, be less than one week, and may provide that the sale may be made on or after a day less than fifteen, but not less than eight days from the first publication of the notice, in which case the notice of sale, and the sale, may be made to correspond with such order. En. March 11, 1872. Am'd. 1880, 95.

Cal. Rep. Cit. 75, 260; 84, 446; 112, 666; 121, 524; 121, 528.

§ 1550. Ninety per cent of appraised value must be offered. No sale of real estate at private sale shall be confirmed by the court, unless the sum offered is at least ninety per cent, of the appraised value thereof, nor unless

such real estate has been appraised within one year of the time of such sale. If it has not been so appraised, or if the court is satisfied that the appraisement is too high or too low, appraisers must be appointed, and they must make an appraisement thereof in the same manner as in case of an original appraisement of an estate. This may be done at any time before the sale or the confirmation thereof. En. March 11, 1872.

Cal. Rep. Cit. 83, 357; 83, 358.

§ 1551. Purchase money on sale on credit, how secured. The executor or administrator must, when the sale is made upon a credit, take the notes of the purchaser for the purchase money, with a mortgage on the property to secure their payment. En. March 11, 1872.

Prob. Act, sec. 168. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

§ 1552. Return of proceedings and hearing. Setting aside sale. Resale. The executor or administrator, after making any sale of real estate, must make a return of his proceedings to the court, which must be filed in the office of the clerk at any time subsequent to the sale. A hearing upon the return of the proceedings may be asked for in the return or by petition subsequently, and thereupon the clerk must fix the day for the hearing, of which notice of at least ten days must be given by the clerk by notices posted in three public places in the county or by publication in a newspaper, and must briefly indicate the land sold, the sum for which it was sold, and must refer to the return for further particulars. Upon the hearing, the court must examine the return and witnesses in relation to the same, and if the proceedings were unfair or the sum bid disproportionate to the value, and if it appears that a sum exceeding such bid at least ten per cent exclusive of a new sale may be obtained, the court may vacate the sale and direct another to be had, of which notice must be given, and the sale in all respects conducted as if no previous sale had taken place. If an offer of ten per cent more in amount than that named in the return be made to the court, in writing, by a responsible person, it is in the discretion of the court to accept such offer and confirm the sale to such person, or to order a new sale. En. March 11, 1872. Am'd. 1880, 96; 1891, 427.

Cal. Rep. Cit. 49, 495; 49, 496; 50, 99; 115, 205; 115, 206; 116, 409; 125, 433; 127, 544; 138, 197; 142, 157.

Prob. Act, sec. 169. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 643; 1864, 370.

Cal. Rep. Cit. 20, 125; 48, 385.

Sales under will: Post, sec. 1561.

Notice of petition for confirmation of sale, description of property by reference in: Post, sec. 1712.

Attorney, court may appoint, to represent party: Post, sec. 1718.

§ 1553. May file objections, when and who. When return of the sale is made and filed, any person interested in the estate may file written objections to the confirmation thereof, and may be heard thereon, when the return is heard by the court or judge, and may produce witnesses in support of his objections. En. March 11, 1872.

Cal. Rep. Cit. 98, 605.

Prob. Act, sec. 170. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 644.

Cal. Rep. Cit. 9, 128.

§ 1554. When order of confirmation is to be made and when not. If it appears to the court that the sale was legally made and fairly conducted, and that the sum bid was not disproportionate to the value of the property sold, and that a greater sum, as above specified, cannot be obtained, or if the increased bid mentioned in section fifteen hundred and fifty-two be made and accepted by the court, the court must make an order confirming the sale, and directing conveyances to be executed. The sale, from that time, is confirmed and valid, and a certified copy of the order confirming it and directing conveyances to be executed, must be recorded in the office of the recorder of the county in which the land sold is situated. If, after the confirmation, the purchaser neglects or refuses to comply with the terms of sale, the court may, on motion of the executor or administrator, and after notice to the purchaser, order a resale to be made of the property. If the amount realized on such resale does not cover the bid and the expenses of the previous sale, such purchaser is liable for the deficiency to the estate. En. March 11, 1872.

Cal. Rep. Cit. 98, 613; 102, 575; 115, 206; 125, 433.

Prob. Act, sec. 171. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1856, 20; 1861, 644.

Cal. Rep. Cit. 9, 128; 9, 197; 19, 410; 20, 125; 49, 85.

Proof of notice before sale and recital in: Post, sec. 1556; recording certified copy: Post, sec. 1719.

§ 1555. **Conveyances.** Conveyances must thereupon be executed to the purchaser by the executor or administrator, and they must refer to the orders of the court authorizing and confirming the sale of the property of the estate, and directing conveyances thereof to be executed, and to the record of the order of confirmation in the office of the county recorder, either by the date of such recording, or by the date, volume, and page of the record, and such reference shall have the same effect as if the orders were at large inserted in the conveyance. Conveyances so made convey all the right, title, interest, and estate of the decedent in the premises, at the time of his death; if prior to the sale, by operation of law or otherwise, the estate has acquired any right, title, or interest in the premises, other than or in addition to that of the decedent at the time of his death, such right, title or interest, also passes by such conveyances. En. March 11, 1872. Am'd. 1880, 96.

Cal. Rep. Cit. 57, 459; 144, 668; 144, 669.

Prob. Act, sec. 172. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1856, 20; 1861, 644.

Cal. Rep. Cit. 9, 128; 19, 410.

§ 1556. **Order of confirmation, what to state.** Before any order is entered confirming the sale, it must be proved to the satisfaction of the court that notice was given of the sale as prescribed, and the order of confirmation must show that such proof was made. En. March 11, 1872.

Prob. Act, sec. 173. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Notice of sale, generally: Ante, secs. 1547, 1549.

§ 1557. **Sale may be postponed.** If, at the time appointed for the sale, the executor or administrator deems it for the interest of all persons concerned therein that the same be postponed, he may postpone it from time to time, not exceeding in all three months. En. March 11, 1872.

Prob. Act, sec. 174. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

§ 1558. Notice of postponement. In case of a postponement, notice thereof must be given, by a public declaration, at the time and place first appointed for the sale, and if the postponement be for more than one day, further notice must be given, by posting notices in three or more public places in the county where the land is situated, or publishing the same, or both, as the time and circumstances will admit. En. March 11, 1872.

Prob. Act, sec. 175. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 644.

Publishing notice: Post, sec. 1705.

§ 1559. Sale of real estate to pay legacies. En. March 11, 1872. Rep. 1873-4, 371.

Prob. Act, sec. 176. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 31, 606; 31, 616.

§ 1560. Where payment of debts, etc., provided for by will. If the testator makes provision by his will, or designates the estate to be appropriated for the payment of his debts, the expenses of administration, or family expenses, they must be paid according to such provision or designation, out of the estate thus appropriated, so far as the same is sufficient. En. March 11, 1872.

Cal. Rep. Cit. 57, 459; 120, 92; 145, 510; 145, 511.

Prob. Act, sec. 177. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 31, 616; 31, 617.

Insufficient provision, in will, effect of: Post, sec. 1562.

Payment of debts and expenses, generally: Ante, sec. 1516.

Order of appropriation: Civ. Code, sec. 1359.

§ 1561. Sale without order. When property is directed by the will to be sold, or authority is given in the will to sell property, the executor may sell any property of the estate without order of the court, and at either public or private sale, and with or without notice, as the executor may determine; but the executor must make return of such sales, as in other cases; and if directions are given in the will as to the mode of selling, or the particular

property to be sold, such directions must be observed. In either case no title passes unless the sale be confirmed by the court. En. March 11, 1872. Am'd. 1873-4, 371; 1880, 96.

Cal. Rep. Cit. 49, 495; 50, 99; 57, 459; 88, 587; 92, 186; 107, 593; 107, 595; 114, 660; 116, 407; 116, 408; 120, 92; 125, 432; 139, 654; 144, 126.

Prob. Act, sec. 178. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 645.

Cal. Rep. Cit. 31, 606; 32, 441; 49, 84; 49, 85; 49, 86; 49, 495.

§ 1562. Where provision by will insufficient. If the provision made by the will, or the estate appropriated therefor, is insufficient to pay the debts, expenses of administration, and family expenses, that portion of the estate not devised or disposed of by the will, if any, must be appropriated and disposed of for that purpose, according to the provisions of this chapter. En. March 11, 1872.

Cal. Rep. Cit. 120, 92; 145, 509; 145, 510; 145, 511.

Prob. Act, sec. 179. En. April 22, 1850. Rep. 1851, 483. En. 1851, 448.

Cal. Rep. Cit. 31, 607.

§ 1563. Estate subject to debts, etc. The estate, real and personal, given by will to legatees or devisees, is liable for the debts, expenses of administration, and family expenses, in proportion to the value or amount of the several devises or legacies, but specific devises or legacies are exempt from such liability, if it appears to the court necessary to carry into effect the intention of the testator, and there is other sufficient estate. En. March 11, 1872.

Cal. Rep. Cit. 127, 277; 131, 119; 142, 456.

Prob. Act, sec. 180. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 31, 607; 31, 609; 31, 616; 31, 619; 33, 667; 48, 193.

Real and personal property alike chargeable: Ante, sec. 1516.

§ 1564. **Contribution among legatees.** When an estate given by will has been sold for the payment of debts or expenses, all the devisees and legatees must contribute according to their respective interests to the devisee or legatee whose devise or legacy has been taken therefor, and the court, when distribution is made, must, by decree for that purpose, settle the amount of the several liabilities, and decree the amount each person shall contribute, and reserve the same from their distributive shares, respectively, for the purpose of paying such contribution. En. March 11, 1872. Am'd. 1880, 97.

Cal. Rep. Cit. 142, 456.

Prob. Act, sec. 181. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 31, 607; 31, 609; 31, 616; 33, 667; 48, 192.

§ 1565. **Contract for purchase of lands may be sold, how.** If a decedent, at the time of his death, was possessed of a contract for the purchase of lands, his interest in such land and under such contracts may be sold on the application of his executor or administrator, in the same manner as if he had died seised of such land, and the same proceedings may be had for that purpose as are prescribed in this chapter for the sale of lands of which he died seised, except as hereinafter provided. En. March 11, 1872.

Prob. Act, sec. 182. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

§ 1566. **Conditions of sale.** The sale must be made subject to all payments that may thereafter become due on such contracts, and if there are any such, the sale must not be confirmed by the court until the purchasers execute a bond to the executor or administrator for the benefit and indemnity of himself and of the persons entitled to the interest of the decedent in the lands so contracted for, in double the whole amount of payments thereafter to become due on such contract, with such sureties as the court or judge shall approve. En. March 11, 1872. Am'd. 1880, 97.

Prob. Act, sec. 183. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

§ 1567. **Purchaser to give bond.** The bond must be conditioned that the purchaser will make all payments for

such land that become due after the date of the sale, and will fully indemnify the executor or administrator and the persons so entitled, against all demands, costs, charges, and expenses, by reason of any covenant or agreement contained in such contract. En. March 11, 1872.

Prob. Act, sec. 184. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

§ 1568. **Executor to assign contract.** Upon the confirmation of the sale, the executor or administrator must execute to the purchaser an assignment of the contract, which vests in the purchaser, his heirs and assigns, all the right, title, and interest of the estate, or of the persons entitled to the interest of the decedent, in the lands sold at the time of the sale, and the purchaser has the same rights and remedies against the vendor of such land as the decedent would have had if he were living. En. March 11, 1872.

Prob. Act, sec. 185. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

§ 1569. **Sales by executors or administrators of lands under mortgage or lien.** When any sale is made by an executor or administrator, pursuant to provisions of this chapter, of lands subject to any mortgage or other lien, which is a valid claim against the estate of the decedent, and has been presented and allowed, the purchase money must be applied, after paying the necessary expenses of the sale, first, to the payment and satisfaction of the mortgage or lien, and the residue, if any, in due course of administration. The application of the purchase money to the satisfaction of the mortgage or lien must be made without delay; and the land is subject to such mortgage or lien until the purchase money has been actually so applied. No claim against any estate, which has been presented and allowed, is affected by the statute of limitations, pending the proceedings for the settlement of the estate. The purchase money, or so much thereof as may be sufficient to pay such mortgage or lien, with interest, and any lawful costs and charges thereon, may be paid into the court, to be received by the clerk thereof, whereupon the mortgage or lien upon the land must cease and the purchase money must be paid over by the clerk of the court without delay, in payment of the expenses of the sale, and in satisfaction of the debt to secure which the mort-

gage or other lien was taken, and the surplus, if any, at once returned to the executor or administrator, unless for good cause shown, after notice to the executor or administrator, the court otherwise directs. En. March 11, 1872. Am'd. 1880, 97.

Cal. Rep. Cit. 60, 260; 68, 54; 72, 548; 82, 100; 128, 391; 135, 352; 138, 304; 138, 305; 138, 308; 1422, 473; 142, 475; 146, 202.

Prob. Act, sec. 186. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 645; 1863, 698.

Cal. Rep. Cit. 9, 128; 18, 687; 27, 354; 27, 356; 29, 369.

Prob. Act, sec. 187. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Claim secured by mortgage: Ante, secs. 1497, 1500.

Deposit in court: Ante, secs. 572-74; post, sec. 2104.

§ 1570. The holder of the mortgage or lien may purchase the lands. His receipt to the amount of his claim a valid payment. At any sale, under order of the court, of lands upon which there is a mortgage or lien, the holder thereof may become the purchaser, and his receipt for the amount due him from the proceeds of the sale is a payment pro tanto. If the amount for which he purchased the property is insufficient to defray the expenses and discharge his mortgage or lien, he must pay to the court, or the clerk thereof, an amount sufficient to pay such expenses. En. March 11, 1872. Am'd. 1880, 97.

Cal. Rep. Cit. 128, 392; 138, 304.

§ 1571. Administrator and executor liable for misconduct in sale. If there is any neglect or misconduct in the proceedings of the executor in relation to any sale, by which any person interested in the estate suffers damage, the party aggrieved may recover the same in an action upon the bond of the executor or administrator, or otherwise. En. March 11, 1872.

Cal. Rep. Cit. 67, 248.

Prob. Act, sec. 188. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Bond of executor, etc.: Ante, sec. 1388.

§ 1572. **Fraudulent sales.** Any executor or administrator who fraudulently sells any real estate of a decedent contrary to or otherwise than under the provisions of this chapter, is liable in double the value of the land sold, as liquidated damages, to be recovered in an action by the person having an estate of inheritance therein. En. March 11, 1872.

Cal. Rep. Cit. 67, 248.

Prob. Act, sec. 189. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 29, 35.

Prohibited connection with sale: Post, sec. 1576.

§ 1573. **Limitation of actions for vacating sale, etc.** No action for the recovery of any estate sold by an executor or administrator, under the provisions of this chapter, can be maintained by any heir or other person claiming under the decedent, unless it be commenced within three years next after the settlement of the final account of the executor or administrator. An action to set aside the sale may be instituted and maintained at any time within three years from the discovery of the fraud, or other grounds upon which the action is based. En. March 11, 1872. Am'd. 1880, 112.

Cal. Rep. Cit. 66, 111; 79, 15; 82, 180; 82, 181; 94, 250; 122, 42; 122, 44; 122, 49; 122, 50; 125, 259; 125, 260.

Prob. Act, sec. 190. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 37, 380; 47, 168; 57, 388; 79, 15; 122, 44.

Persons under disability, provision inapplicable to: Post, sec. 1574.

Discovery of the fraud, within three years of: Ante, sec. 338, subd. 4.

§ 1574. **To what cases preceding section not to apply.** The preceding section shall not apply to minors or others under any legal disability to sue at the time when the right of action first accrues; but all such persons may commence an action at any time within three years after the removal of the disability. En. March 11, 1872.

Cal. Rep. Cit. 82, 181; 121, 42; 122, 44; 122, 49; 122, 50.

Prob. Act, sec. 191. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 122, 44.

§ 1575. **Account of sale to be returned.** When a sale has been made by an executor or administrator of any property of the estate, real or personal, he must return to the court, within thirty days thereafter, an account of sales, verified by his affidavit, or in case of his absence from the county, or other inability, by the affidavit of his attorney. If he neglects to make such return, he may be punished by attachment, or his letters may be revoked, one day's notice having been first given him to appear and show cause why such attachment should not issue, or such revocation should not be made. En. March 11, 1872. Am'd. 1880, 98; 1897, 58.

Prob. Act, sec. 192. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Attachment for contempt: Ante, secs. 1212 et seq.

Notice by citation: Post, sec. 1710; also, post, secs. 1707-1709.

§ 1576. **Executor, etc., not to be purchaser.** No executor or administrator must, directly or indirectly, purchase any property of the estate he represents, nor must he be interested in any sale. En. March 11, 1872.

Cal. Rep. Cit. 81, 509; 81, 515; 81, 516; 81, 517; 81, 519; 81, 520; 93, 120; 96, 668; 108, 341.

Prob. Act, sec. 193. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 29, 34; 29, 36; 48, 121.

Purchase by administrator, etc., forbidden: Post, sec. 1617.

ARTICLE V.

[New article added March 15, 1887, Stats. 1887, p. 115. In effect immediately.]

MORTGAGES AND LEASES OF REAL ESTATE.

§ 1577. Mortgage of real property of decedent.

§ 1578. Proceedings to obtain order.

§ 1579. To obtain lease of realty.

§ 1577. Mortgage of real property of decedent. Whenever in any estate now being administered or that may hereafter be administered it shall appear to the superior court, or a judge thereof, to be for the advantage of the estate to raise money upon a note or notes, to be secured by a mortgage of the real property of any decedent, or of a minor, or an incompetent person, or any part thereof, or to make a lease of said realty or any part thereof, the court or judge, as often as occasion therefor shall arise in the administration of any estate, may, on a petition, notice, and hearing as provided in this article, authorize, empower, and direct the executor or administrator or guardian of such minor or incompetent person to mortgage such real estate or any part thereof, and to execute a note or notes to be secured by such mortgage, or to lease such real estate or any part thereof. En. Stats. 1887, 115. Am'd. 1891, 247; 1893, 72.

Cal. Rep. Cit. 97, 457; 121, 650; 122, 100; 131, 118; 131, 120; 131, 671; 133, 259; 144, 126; 145, 401.

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§ 1578. Proceedings to obtain order. To obtain an order to mortgage such realty, the proceedings to be taken and the effect thereof shall be as follows:

First. The executor or administrator of any estate, or guardian of any minor or incompetent person, or any person interested in the estates of such decedents, minors, or incompetent persons, may file a verified petition showing:

1. The particular purpose or purposes for which it is proposed to make the note or notes and mortgage, which shall be either to pay the debts, legacies, or charges of administration, or to pay, reduce, extend, or renew some lien or mortgage already subsisting in said realty or some part thereof.

2. A statement of the debts, legacies, charges of administration, liens or mortgages to be paid, reduced, extended, or renewed, as the case may be.

3. The advantage that may accrue to the estate from raising the required money by note or notes and mortgage or providing for the payment, reduction, extension, or renewal of the subsisting liens or mortgages, as the case may be.

4. The amount to be raised, with a general description of the property proposed to be mortgaged; and,

5. The names of the legatees and devisees, if any, and of the heirs of the deceased, or of the minor, or of the incompetent person, as the case may be, so far as known to the petitioner.

Second. Upon filing such petition, an order shall be made by the court or judge, requiring all persons interested in the estate to appear before the court or judge, at a time and place specified, not less than four nor more than ten weeks thereafter, then and there to show cause why the realty (briefly indicating it), or some part thereof, should not be mortgaged for the amount mentioned in the petition (stating such amount), or such lesser amount as to the court or judge shall seem meet, and referring to the petition on file for further particulars.

Third. The order to show cause may be personally served on the persons interested in the estate, at least ten days before the time appointed for hearing the petition, or may be published for four successive weeks in a newspaper of general circulation, published in the county.

Fourth. At the time and at the place appointed in the order to show cause, or at such other time and place to which the hearing may be postponed (the power to make all needful postponements being hereby vested in the court or judge), having first received satisfactory proof of personal service or publication of the order to show cause, the court or judge must proceed to hear the petition and any objections that may be filed or presented thereto. Upon such hearing, witnesses may be compelled to attend and testify, in the same manner, and with like effect, as in other cases; and if, after a full hearing, the court or judge is satisfied that it will be for the advantage of the estate to mortgage the whole or any portion of the real estate, an order must be made authorizing, empowering, and directing the executor or administrator, or the guardian of such minor or incompetent person, to make such mortgage, and

a promissory note or notes to the lender, for the amount of the loan, to be secured by said mortgage; the order may direct that a lesser amount than that named in the petition be borrowed, and may prescribe the maximum rate of interest and period of the loan, and may direct in what coin or currency it shall be paid, and require that the interest and the whole or any part of the principal be paid, from time to time, out of the whole estate or any part thereof, and that any buildings on the premises to be mortgaged shall be insured for further security of the lender, and the premiums paid from such income.

Fifth. After the making of the order to mortgage, the executor, administrator, or guardian of a minor or of an incompetent person shall execute and deliver a promissory note or notes for the amount and period specified in the order, and shall execute, acknowledge, and deliver a mortgage of the premises, setting forth in the mortgage that it is made by authority of the order, and giving the date of such order. A certified copy of the order shall be recorded in the office of the county recorder of every county in which the encumbered land, or any portion thereof, lies. The note or notes and mortgage shall be signed by the executor, administrator, or guardian as such, and shall create no personal liability against the person so signing.

Sixth. Every note or notes and mortgage so made shall be effectual to mortgage and hypothecate all the right, title, interest, and estate which the decedent, minor, or incompetent person had in the premises described therein at the time of the death of such decedent, or at the time of the appointment of the guardian of such minor or of such incompetent person, or prior thereto, and any right, title, or interest in said premises acquired by the estate of such decedent, minor, or incompetent person, by operation of law or otherwise, since the time of the death of such decedent, or the appointment of the guardian of such minor or incompetent person. Jurisdiction of the court to administer the estate of such decedent, minor, or incompetent person shall be effectual to vest such court and judge with jurisdiction to make the order for the note or notes and mortgage, and such jurisdiction shall conclusively inure to the benefit of the mortgagee named in the mortgage, his heirs and assigns. No irregularity in the proceedings shall impair or invalidate the same or the note or notes and mortgage given in the pursuance thereof, and the mortgagee, his heirs and assigns, shall have and possess the

same rights and remedies on the note or notes and mortgage as if it had been made by the decedent prior to his death, the minor after reaching the age of maturity, or the incompetent person when legally competent; provided, however, that upon any foreclosure, if the proceeds of the encumbered property are insufficient to pay the note or notes, and mortgage, no judgment or claim for any deficiency of such proceeds to satisfy the note or notes and mortgage, or the costs or expenses of sale, shall be had or allowed, except in cases where the note or notes and mortgage were given to pay, reduce, extend, or renew a lien or mortgage subsisting on the realty, or some part thereof, at the time of the death of the decedent, and the indebtedness secured by such lien or mortgage was an allowed and approved claim against his estate, or a lien upon the interest of the minor in said real estate at the time it vested in him, or upon the estate of the incompetent at the time the incompetency of the incompetent person was so declared by the court; and provided also, that in cases affecting the estate of the deceased persons, the part of the indebtedness remaining unsatisfied must be classed and paid with other demands against the estate, as provided in article three, chapter ten, of title eleven, part three, of this code, with respect to mortgages subsisting at the time of death. En. Stats. 1887, 115. Am'd. 1891, 247; 1893, 72.

Cal. Rep. Cit. 97, 457; 120, 611; 121, 650; 127, 204; 131, 113; 131, 120; 131, 671; 131, 674; 133, 259; 145, 401.
Subd. 1—139, 284; 144, 126. Subd. 3—97, 458.

§ 1579. To obtain lease of realty. To obtain an order to lease the realty, the proceedings to be taken and the effect thereof shall be as follows:

First. The executor, administrator, guardian of a minor or of an incompetent person, or any person interested in the estate of such decedents, minors, or incompetent persons, may file a verified petition showing:

1. The advantage or advantages that may accrue to the estate from giving a lease.
2. A general description of the property proposed to be leased.
3. The term, rental, and general conditions of the proposed lease.

4. The names of the legatees and devisees, if any, and of the heirs of the deceased, or of the minor, or of the incompetent person, so far as known to the petitioner.

Second. Order of court to show cause. Upon filing such petition an order shall be made by the court or judge requiring all persons interested in the estate to appear before the court or judge, at a time and place specified, not less than two nor more than four weeks thereafter, then and there to show cause why the realty (briefly indicating it) should not be leased for the period (stating it), at the rental mentioned in the petition (stating it), and referring to the petition on file for further particulars.

Third. Service of order. The order to show cause may be personally served on the persons interested in the estate at least ten days before the time appointed for hearing the petition, or it may be published for two successive weeks in a newspaper of general circulation in the county.

Fourth. Hearing; witnesses; appraisers; minimum rental. At the time and place appointed to show cause, or at such other time and place to which the hearing may be postponed (the power to make all needful postponements being hereby vested in the court or judge), the court or judge having first received satisfactory proof of personal service or publication of the order to show cause, must proceed to hear the petition, and any objections that may have been filed or presented thereto. Upon such hearing, witnesses may be compelled to attend and testify in the same manner and with like effect as in other cases, and the court may, in its discretion, appoint one or more, not exceeding three, disinterested persons to appraise the rental value of the premises, and direct that a reasonable compensation for the services, not exceeding five dollars per day, be paid by the estate. If, after a full hearing, the court or judge is satisfied that it will be for the advantage of the estate to lease the whole or any portion of the real estate, an order must be made authorizing, empowering, and directing the executor, administrator, or the guardian to make such lease. The order may prescribe the minimum rental to be received for the premises, and the period of the lease, which must in no case be longer than for ten years, and may prescribe the other terms and conditions of such lease.

Fifth. Conditions of lease. After the making of the order to lease, the executor, administrator, or guardian of a minor or of an incompetent person shall execute, acknowledge, and deliver a lease of the premises for the term and period and with the conditions specified in the order, set-

ting forth in the lease that it is made by authority of the order, and giving the date of such order. A certified copy of the order shall be recorded in the office of the county recorder of every county in which the leased land or any portion thereof lies.

Sixth. Effect of lease; errors and omissions. Every lease so made shall be effectual to demise and let, at the rent, for the term, and upon the conditions therein prescribed, the premises described therein. Jurisdiction of the court to administer the estate of the decedent, the minor, or of the incompetent person shall be effectual to vest such court and judge with jurisdiction to make the order for the lease, and such jurisdiction shall conclusively inure to the benefit of the lessee, his heirs and assigns. No omission, error, or irregularity in the proceedings shall impair or invalidate the same, or the lease made in pursuance thereof. En. Stats. 1887, 117. Am'd. 1891, 247; 1905, 149.

Supp. Cal. Rep. Cit. 144, 126.

The only change consists in the substitution of the word "ten" for "five," to make this section correspond with the present form of section 718 of the Civil Code, which was amended in 1903. Whoever amended the latter section at the last session of the legislature forgot to amend this section of the Code of Civil Procedure to correspond with it.—Code Commissioner's Note.

CHAPTER VIII.

OF THE POWERS AND DUTIES OF EXECUTORS AND ADMINISTRATORS, AND OF THE MANAGEMENT OF ESTATES.

- § 1581. Executors to take possession of the entire estate.
- § 1582. Actions may be maintained by and against executors and administrators.
- § 1583. May maintain actions for waste, conversion, and trespass.
- § 1584. Executor and administrator may be sued for waste or trespass of decedent.
- § 1585. Surviving partner to settle up business. Interest therein to be appraised. Account to be rendered.
- § 1586. Actions on bond of executor or administrator may be brought by another administrator.
- § 1587. What executors are not parties to actions.
- § 1588. May compound.
- § 1589. Recovery of property fraudulently disposed of by testator.
- § 1590. When executor to sue, as provided in preceding section.
- § 1591. Disposition of estate recovered.

§ 1581. Executors to take possession of the entire estate. The executor or administrator must take into his possession all the estate of the decedent, real and personal, and collect all debts due to the decedent or to the estate. For the purpose of bringing suits to quiet title, or for partition of such estate, the possession of the executors or administrators is the possession of the heirs or devisees; such possession by the heirs or devisees is subject, however, to the possession of the executor or administrator, for the purposes of administration, as provided in this title. En. March 11, 1872.

Cal. Rep. Cit. 57, 388; 57, 459; 69, 158; 70, 360; 109, 423; 110, 575; 112, 395; 119, 477; 121, 25; 126, 484; 131, 671; 134, 83; 136, 34; 137, 355.

Prob. Act sec. 194. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 645.

Cal. Rep. Cit. 17, 536; 20, 163; 20, 627; 42, 463; 43, 551; 44, 589; 57, 387; 57, 388.

Possession of estate by executor etc.: Sec. 1452.

Collection of debts, when no liability for failure: Sec. 1615.

Executor or administrator, suits by and against: Secs. 1582-1587, 1589, 1590.

Heir may maintain ejectment and suit to quiet title during possession of executor, etc.: Sec. 1452.

§ 1582. Actions may be maintained by and against executors and administrators. Actions for the recovery of any property, real or personal, or for the possession thereof, or to quiet title thereto, or to determine any adverse claim thereon, and all actions founded upon contracts, may be maintained by and against executors and administrators in all cases in which the same might have been maintained by or against their respective testators or intestates. En. March 11, 1872. Am'd. 1895, 81.

Cal. Rep. Cit. 57, 241; 67, 570; 70, 360; 83, 512; 107, 112; 110, 575; 119, 550; 126, 32; 126, 484; 128, 635; 136, 33; 136, 36.

Prob. Act, sec. 195. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 19, 117; 20, 163; 20, 627; 26, 123; 50, 658.

Executors and administrators—Suits by, after substitution: Ante, sec. 385; without joining beneficiaries: Ante, sec. 369; suits against, costs: Ante, sec. 1509.

Suggestion of death where action by deceased pending: Ante, sec. 385.

The right to maintain suits for the possession of the real property of the estate: Ante, sec. 1452.

§ 1583. May maintain actions for waste, conversion, and trespass. Executors and administrators may maintain action against any person who has wasted, destroyed, taken, or carried away, or converted to his own use, the goods of their testator or intestate, in his lifetime. They may also maintain actions for trespass committed on the real estate of the decedent in his lifetime. En. March 11, 1872.

Prob. Act, sec. 196. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 19, 117.

§ 1584. Executor and administrator may be sued for waste or trespass of decedent. Any person or his personal representatives may maintain an action against the executor or administrator of any testator or intestate who in his lifetime has wasted, destroyed, taken, or carried away, or converted to his own use, the goods or chattels of any such person, or committed any trespass on the real estate of such person. En. March 11, 1872.

Cal. Rep. Cit. 57, 246; 108, 483.

Prob. Act, sec. 197. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

§ 1585. Surviving partner to settle up business. Interest therein to be appraised. Account to be rendered. When a partnership exists between the decedent, at the time of his death, and any other person, the surviving partner has the right to continue in possession of the partnership, and to settle its business, but the interest of the decedent in the partnership must be included in the inventory, and be appraised as such other property. The surviving partner must settle the affairs of the partnership without delay, and account with the executor or administrator, and pay over such balances as may from time to time be payable to him, in right of the decedent. Upon the application of the executor or administrator, the court, or a judge thereof, may, whenever it appears necessary, order the surviving partner to render an account, and in case of neglect or refusal may, after notice, compel it by attachment; and the executor or administrator may maintain against him any action which the decedent could have maintained. En. March 11, 1872. Am'd. 1880, 98.

Cal. Rep. Cit. 57, 459; 65, 111; 68, 396; 68, 397; 70, 582; 75, 462; 84, 94; 89, 551; 96, 72; 100, 614; 101, 562; 105, 190; 107, 606; 110, 574; 138, 237.

Prob. Act, sec. 198. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 16, 118; 34, 263.

Interest of decedent, in partnership, may be sold: Ante, sec. 1524.

§ 1586. Actions on bond of executor or administrator may be brought by another administrator. An administrator may, in his own name, for the use and benefit of all parties interested in the estate, maintain actions on the same estate. En. March 11, 1872.

Cal. Rep. Cit. 123, 438.

Prob. Act, sec. 199. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Bond of executor or administrator: Secs. 1388 et seq.

§ 1587. What executors are not parties to actions. In actions by or against executors, it is not necessary to join

those as parties to whom letters were issued, but who have not qualified. En. March 11, 1872.

Prob. Act, sec. 200. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Parties, beneficiaries need not be joined: Ante, sec. 369.

§ 1588. **May compound.** Whenever a debtor of the decedent is unable to pay all his debts, the executor or administrator, with the approbation of the court, or a judge thereof, may compound with him and give him a discharge, upon receiving a fair and just dividend of his effects. A compromise may also be authorized when it appears to be just, and for the best interest of the estate. En. March 11, 1872. Am'd. 1880, 98.

Cal. Rep. Cit. 57, 343; 86, 144; 123, 676; 135, 40.

Prob. Act, sec. 201. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 645.

§ 1589. **Recovery of property fraudulently disposed of by testator.** When there is a deficiency of assets in the hands of an executor or administrator, and when the decedent, in his lifetime, has conveyed any real estate, or any rights or interests therein with intent to defraud his creditors, or to avoid any right, debt, or duty of any person, or has so conveyed such estate that by law the deeds or conveyances are void as against creditors, the executor or administrator must commence and prosecute to final judgment any proper action for the recovery of the same; and may recover for the benefit of the creditor all such real estate so fraudulently conveyed; and may also, for the benefit of the creditors, sue and recover all goods, chattels, rights, or credits which have been so conveyed by the decedent in his lifetime, whatever may have been the manner of such fraudulent conveyance. En. March 11, 1872.

Cal. Rep. Cit. 50, 302; 53, 715; 57, 241; 61, 152; 82, 160; 85, 547; 85, 549; 89, 352; 104, 222; 106, 108; 106, 109; 109, 667; 114, 529; 114, 535; 137, 158; 137, 170; 143, 614.

Prob. Act, sec. 202. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 48, 393.

Executor or administrator may sue without joining beneficiaries: Ante, sec. 369.

Power to bring action: Ante, secs. 1452, 1581-1583.

Fraudulent conveyances: Post, secs. 1590, 1591.

§ 1590. When executor to sue, as provided in preceding section. No executor or administrator is bound to sue for such estate, as mentioned in the preceding section, for the benefit of the creditors, unless an application of creditors, who must pay such part of the costs and expenses of the suit, or give such security to the executor or administrator therefor, as the court, or a judge thereof, shall direct. En. March 11, 1872. Am'd. 1880, 98.

Cal. Rep. Cit. 61, 152; 82, 160; 85, 547; 109, 667; 114, 535.

Prob. Act, sec. 203. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 48, 393.

§1591 - § 1591. Disposition of estate recovered. All real estate so recovered must be sold for the payment of debts, in the same manner as if the decedent had died seised thereof, upon obtaining an order therefor from the court; and the proceeds of all goods, chattels, rights, and credits so recovered must be appropriated in payment of the debts of the decedent in the same manner as other property in the hands of the executor or administrator. En. March 11, 1872. Am'd. 1880, 98.

Cal. Rep. Cit. 57, 241; 82, 160; 85, 547.

Prob. Act, sec. 204. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

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CHAPTER IX

OF THE CONVEYANCE OF REAL ESTATE BY COURT AND BY ADMINISTRATOR.

- § 1597. Executor to complete contracts for sale of real estate.
- § 1598. Petition for executor to make conveyance, and notice of hearing.
- § 1599. Interested parties may contest.
- § 1600. Conveyances when ordered to be made.
- § 1601. Execution of conveyance and record thereof.
- § 1602. Rights of petitioner to enforce contract.
- § 1603. Effect of conveyance.
- § 1604. Effect of recording a copy of the decree.
- § 1605. Recording decree does not supersede power of court to enforce it.
- § 1606. Where party to whom conveyance to be made is dead.
- § 1607. Decree may direct possession to be surrendered.

§ 1597. **Executor to complete contracts for sale of real estate.** When a person who is bound by contract in writing to convey any real estate, or to transfer any personal property, dies before making conveyance or transfer, and in all cases when such decedent, if living might be compelled to make such conveyance or transfer, the court, having jurisdiction of the probate proceedings of the estate of such decedent, may make a decree authorizing and directing the executor or administrator of such deceased person to convey or transfer such real estate or personal property to the person entitled thereto. En. March 11, 1872. Am'd. 1880, 99; 1905, 76.

Cal. Rep. Cit. 49, 471; 49, 472; 58, 416; 64, 444; 74, 284; 91, 416; 137, 478; 141, 350; 141, 425; 147, 458.

Prob. Act, sec. 205. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

§ 1598. **Petition for executor to make conveyance, and notice of hearing.** On the presentation of a verified petition by any person claiming to be entitled to such conveyance or transfer from an executor or administrator of such deceased person, setting forth the facts, including a copy of the contract, upon which the claim is predicated, the court, or a judge thereof, must appoint a time and place for hearing the petition, and must order notices thereof to be published at least four successive weeks before such hearing, in such newspaper of general circulation published in the county in which the court is held, as the court may designate. En. March 11, 1872. Am'd. 1880, 99; 1905, 76.

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Cal. Rep. Cit. 64, 445; 91, 416; 124, 247; 124, 253; 124, 254; 141, 350; 141, 425; 147, 458.

Prob. Act, sec. 206. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Verification of pleadings: Ante, sec. 446.

Publication of notice: Post, sec. 1705.

Petition: Ante, sec. 1518.

§ 1599. Interested parties may contest. At the time and place appointed for the hearing, or at such other time to which the same may be postponed, upon satisfactory proof by affidavit or otherwise, of the due publication of the notice, the court shall proceed to hear the said petition, and all persons interested in the estate may appear and contest such petition, by filing their objections in writing, and the court may examine, on oath, the petitioner and all who may be produced before him for that purpose. En. March 11, 1872. Am'd. 1905, 77.

Cal. Rep. Cit. 147, 458.

Prob. Act, sec. 207. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 646.

§ 1600. Conveyances, when ordered to be made. If, after a full hearing upon the petition, and objections, if any there be, and examination of the facts and circumstances of the claim, the court is satisfied that the petitioner is entitled to a conveyance of the real estate, or a transfer of the personal property, described in the petition, a decree, authorizing and directing the executor or administrator to execute a conveyance or transfer thereof to the petitioner, must be made and entered on the minutes of the court. En. March 11, 1872. Am'd. 1905, 77.

Cal. Rep. Cit. 91, 416; 147, 458.

Prob. Act, sec. 208. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 646.

§ 1601. Execution of conveyance and the recording of the order therefor. The executor or administrator must execute the conveyance or transfer according to the directions contained in the decree, which decree shall be prima facie evidence of the correctness of the proceedings, and of the authority of the executor or administrator to make the conveyance or transfer. If the transaction relate to real property, a certified copy of the decree must be recorded with the deed in the office of the recorder of the

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county in which the land conveyed is situated. En. March 11, 1872. Am'd. 1873-4, 371; 1905, 77.

Cal. Rep. Cit. 147, 458.

Prob. Act, sec. 209. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 646.

§ 1602. Rights of petitioner to enforce the contract. If, upon the hearing, as hereinbefore provided, the right of the petitioner to have a specific performance of the contract is found to be doubtful, the court must dismiss the petition without prejudice to the rights of the petitioner, who may, at any time within six months after such dismissal, proceed by action to enforce a specific performance thereof. En. March 11, 1872. Am'd. 1880, 99; 1905, 77.

Cal. Rep. Cit. 61, 163; 141, 350; 141, 425; 147, 459.

Prob. Act, sec. 210. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 646.

§ 1603. Effect of conveyance. Every conveyance or transfer made in pursuance of a decree as provided in this chapter, shall pass title to the property contracted for, as fully as if the contracting party himself was still living, and executed the conveyance or transfer. En. March 11, 1872. Am'd. 1880, 99; 1905, 77.

Prob. Act, sec. 211. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Conveyances by executor, etc.: Ante, sec. 1555.

§ 1604. Effect of recording a copy of the decree. A copy of the decree for a conveyance or transfer as provided in this chapter, duly certified and recorded in the office of the recorder of the county in which the property is situated, gives the person entitled to the conveyance or transfer a right to the possession of the property contracted for, and to hold the same according to the terms of the intended conveyance or transfer, in like manner as if the same had been conveyed or transferred in pursuance of the decree. En. March 11, 1872. Am'd. 1880, 99; 1905, 77.

Prob. Act, sec. 212. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

§ 1605. Recording of the decree does not supersede power of court to enforce it. The recording of any decree, as provided in the preceding section, shall not prevent the court making the decree from enforcing the same by other process. En. March 11, 1872. Am'd. 1905, 77.

Prob. Act, sec. 213. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

§ 1606. Where party to whom conveyance to be made is dead. If the person entitled to the conveyance or transfer dies before the commencement of the proceedings therefor under this chapter, or before the completion of the conveyance or transfer, any person entitled to succeed to his rights in the contract, or the executor or administrator of such decedent, may, for the benefit of the person so entitled, commence such proceedings or prosecute any already commenced, and the conveyance or transfer must be so made as to vest the property in the person or persons entitled thereto, or in the executor or administrator, for their benefit. En. March 11, 1872. Am'd. 1905, 77.

Cal. Rep. Cit. 91, 416.

Prob. Act, sec. 214. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

§ 1607. Decree may direct possession to be surrendered. The decree provided for in this chapter may direct the possession of the property therein described to be surrendered to the person entitled thereto upon his producing the deed or transfer and a certified copy of the decree, when, by the terms of the contract, possession is to be surrendered. En. March 11, 1872. Am'd. 1905, 78.

Cal. Rep. Cit. 58, 416; 64, 444; 91, 416.

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CHAPTER X.

OF ACCOUNTS RENDERED BY EXECUTORS AND ADMINISTRATORS AND OF THE PAYMENT OF DEBTS.

Article I. Liabilities and Compensation of Executors and Administrators, §§ 1612-1618.

II. Accounting and Settlements by Executors and Administrators, §§ 1622-1640.

III. The payment of Debts of the Estate, §§ 1643-1653.

ARTICLE I.

LIABILITIES AND COMPENSATION OF EXECUTORS AND ADMINISTRATORS.

§ 1612. When executor or administrator personally liable.

§ 1613. Executor to be charged with all estate, etc.

§ 1614. Not to profit or lose by estate.

§ 1615. Uncollected debts without fault.

§ 1616. Compensation of the executor and administrator. Compensation of attorney.

§ 1617. Not to purchase claims against the estate.

§ 1618. Executor's and administrator's commissions.

§ 1619. Allowed fees for attorneys.

Gen Cit. to Art.—Cal. Rep. Cit. 131, 427.

§ 1612. When executor or administrator personally liable. No executor or administrator is chargeable upon any special promise to answer damages or to pay the debts of the testator or intestate out of his own estate, unless the agreement for that purpose, or some memorandum or note thereof, is in writing and signed by such executor or administrator, or by some other person by him thereunto specially authorized. En. March 11, 1872. §1612 Am'd. p. 502

Cal. Rep. Cit. 101, 385; 117, 593.

Prob. Act, sec. 215. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Compare: Post, sec. 1973, subd. 2.

§ 1613. Executor to be charged with all estate, etc. Every executor and administrator is chargeable in his account with the whole of the estate of the decedent which may come into his possession, at the value of the appraisement contained in the inventory, except as provided in the following sections, and with all the interest, profit and income of the estate. En. March 11, 1872.

Cal. Rep. Cit. 70, 71; 74, 203; 74, 213; 74, 540; 92, 170; 92, 174; 119, 584; 131, 36; 145, 233; 145, 349; 146, 141.

Prob. Act, sec. 216. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 43, 549; 43, 550.

§ 1614. Not to profit or lose by estate. He shall not make profit by of the increase, nor suffer loss by the decrease or destruction, without his fault, of any part of the estate. He must account for the excess when he sells any part of the estate for more than the appraisement, and if any is sold for less than the appraisement, he is not responsible for the loss if the sale has been justly made. En. March 11, 1872.

Cal. Rep. Cit. 74, 540; 119, 584; 146, 141.

Prob. Act, sec. 217. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 26, 429; 44, 588.

Becoming purchaser: Ante, sec. 1576.

§ 1615. Uncollected debts without fault. No executor or administrator is accountable for any debts due to the decedent, if it appears that they remain uncollected without his fault. En. March 11, 1872.

Cal. Rep. Cit. 74, 203; 109, 423; 123, 104; 131, 36; 133, 615; 140, 398; 145, 233.

Prob. Act, sec. 218. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

§ 1616. Compensation of executor and administrator; compensation of attorney; appeal from order of court. He shall be allowed all necessary expenses in the care, management, and settlement of the estate, and for his services such fees as provided in this chapter; but when the decedent, by his will, makes some other provision for the compensation of his executor, that shall be a full compensation for his services, unless, by a written instrument, filed in the court, he renounces all claim for compensation provided by in the will. Any attorney who has rendered services to an executor or administrator may at any time during the administration, and upon such notice to the other parties interested in the estate as the court shall by order require, apply to the court for an allowance to himself of compensation therefor, and the court shall on the hearing of such application make an order requiring the executor or administrator to pay to such attorney out of the estate such compensation as to the court shall seem proper. Any payment made by an executor or administrator in conformity with such order shall be allowed by the court in his account. Any attorney making such application to the court for compensation and all other persons interested in the estate may appeal from any order made by the court fixing the amount of such compensation. En. March 11, 1872. Am'd. 1873-4, 414; 1880, 99; 1905, 776.

Cal. Rep. Cit. 65, 379; 88, 4; 101, 385; 108, 458; 112, 453; 120, 454; 121, 191; 123, 660; 123, 663; 125, 196; 125, 197; 138, 370; 143, 144.

Prob. Act, sec. 219. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 38, 87; 43, 551.

Compensation for services—commissions, where no provision in will, etc.: Post, sec. 1618.

Costs: Ante, sec. 1509.

§ 1617. Not to purchase claims against the estate. No administrator or executor shall purchase any claim against the estate he represents; and if he pays any claim for less than its nominal value, he is only entitled to charge in his account the amount he actually paid. En. March 11, 1872.

Cal. Rep. Cit. 93, 118; 93, 120; 146, 194.

Prob. Act, sec. 220. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 9, 636; 21, 32.

Purchasing property of estate: Ante, sec. 1576; fraudulently selling realty: Ante, sec. 1572.

§ 1618. Executors and administrators, commissions allowed to. When no compensation is provided by the will, or the executor renounces all claim thereto, he must be allowed commissions upon the amount of estate accounted for by him, as follows: for the first thousand dollars, at the rate of seven per cent; for the next nine thousand dollars, at the rate of four per cent; for the next ten thousand dollars, at the rate of three per cent; for the next thirty thousand dollars, at the rate of two per cent; for the next fifty thousand dollars, at the rate of one per cent; and for all above one hundred thousand dollars, at the rate of one-half of one per cent. The same commissions shall be allowed to administrators. In all cases, such further allowance may be made as the court may deem just and reasonable for any extraordinary service, but the total amount of such extra allowance must not exceed one-half the amount of commissions allowed by this section. Where the property of the estate is distributed in kind, and involves no labor beyond the custody and distribution of the same, the commission shall be computed on all the estate above the value of twenty thousand dollars, at one-half of the rates fixed in this section. Public administrators shall receive the same compensation and allowances as are allowed in this title to other administrators. All contracts between an executor or administrator and an heir, devisee, or legatee, for a higher compensation than that allowed by this section, shall be void. En. March 11, 1872. Am'd. 1873-4, 415; 1880, 100; 1881, 36; 1905, 727.

Cal. Rep. Cit. 65, 379; 65, 381; 70, 71; 96, 527; 108, 456; 110, 566; 119, 584; 121, 191; 123, 103; 124, 48; 125, 197; 127, 188; 133, 463; 143, 508; 144, 556; 144, 557; 146, 596.

Prob. Act, sec. 221. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 646.

Cal. Rep. Cit. 30, 113; 43, 550; 46, 572.

§ 1619. Allowed fees for attorneys; extraordinary service. Executors and administrators shall be allowed for fees of their attorneys for conducting the ordinary probate proceedings, the same amounts as are allowed by the last section as compensation for executors and administrators for their own services. In all cases, such further allow-

ance may be made as the court may deem just and reasonable for any extraordinary service, such as sales or mortgages of real estate, contested or litigated claims against the estate, litigation in regard to the property of the estate, and such other litigation as may be necessary for the executor or administrator to prosecute or defend. En. Stats. 1905, 727.

ARTICLE II.

ACCOUNTING AND SETTLEMENTS BY EXECUTORS AND ADMINISTRATORS.

- § 1622. To render exhibit of receipts and disbursements, and claims allowed.
- § 1623. Citation to account at third term.
- § 1624. Petition for citation to render final or other account.
- § 1625. Citation to account on application.
- § 1626. Objections to account, who may file.
- § 1627. Attachment for not obeying citation.
- § 1628. To render accounts at expiration of term.
- § 1629. Executor to account after his authority revoked.
- § 1630. Revoking authority of executor, when.
- § 1631. To produce and file vouchers, which remain in court.
- § 1632. Vouchers for items less than twenty dollars, when accepted.
- § 1633. Day of settlement to be appointed, and must give notice thereof. Hearing.
- § 1634. When settlement is final, notice must so state.
- § 1635. Interested party may file exceptions to account.
- § 1636. All matters may be contested by the heirs. Hearing.
- § 1637. Settlement of accounts to be conclusive, when and when not.
- § 1638. Proof of notice of settlement of accounts.
- § 1639. In case of death, personal representative to present account.
- § 1640. Moneys invested by order of court.

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§ 1622. To render exhibit of receipts and disbursements and claims allowed. Six months after his appointment and at any time when required by the court, either upon its own motion or upon the application of any person interested in the estate, the executor or administrator must render, for the information of the court, an exhibit under oath, showing the amount of money received and expended by him, the amount of all claims presented against the estate, and the names of the claimants, and all other matters necessary to show the condition of its affairs. En. March 11, 1872. Am'd. 1880, 100.

Cal. Rep. Cit. 109, 423; 112, 81; 127, 188; 131, 416; 146, 594.

Prob. Act, sec. 222. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 9, 636.

§ 1623. Citation to account at third term. If the executor or administrator fails to render an exhibit for six months after his appointment, the court, or a judge thereof, must cause a citation to be issued requiring him to appear and render it. En. March 11, 1872. Am'd. 1880, 100.

Cal. Rep. Cit. 72, 24; 112, 179; 116, 451.

Prob. Act, sec. 223. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Citation: Post, secs. 1707-1711.

§ 1624. Petition for citation to render final or other account. Any person interested in the estate may, at any time before the final settlement of accounts, present his petition to the court, or a judge thereof, praying that the executor or administrator be required to appear and render such exhibit, setting forth the facts showing that it is necessary and proper that such an exhibit should be made. En. March 11, 1872. Am'd. 1880, 100.

Cal. Rep. Cit. 80, 97; 119, 241. Subd. 5—112, 441.

Prob. Act, sec. 224. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

§ 1625. Citation to account on application. If the court or a judge thereof, is satisfied, either from the oath of the applicant or from any other testimony offered, that the facts alleged are true, and considers the showing of the applicant sufficient, he must direct a citation to be issued to the executor or administrator, requiring him to appear, at some day to be named in the citation, and render an exhibit as prayed for. En. March 11, 1872. Am'd. 1880, 100.

Cal. Rep. Cit. 112, 81; 116, 451.

Prob. Act, sec. 225. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

§ 1626. Objections to account, who may file. When an exhibit is rendered by an executor or administrator, any person interested may appear, and by objections in writing, contest any account or statement therein contained. The court may examine the executor or administrator, and if he has been guilty of neglect, or has wasted, embezzled, or mismanaged the estate, his letters must be revoked. En. March 11, 1872.

Cal. Rep. Cit. 123, 104.

Prob. Act, sec. 226. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 26, 57.

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Any person interested: Post, sec. 1635.

Revocation for misconduct: Ante, secs. 1436 et seq.

§ 1627. Attachment for not obeying citation. If any executor or administrator neglects or refuses to appear and render an exhibit, after having been duly cited, an attachment may be issued against him, and such exhibit enforced, or his letters may be revoked, in the discretion of the court. En. March 11, 1872.

Prob. Act, sec. 227. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 26, 429.

Contempt: Ante, secs. 1209 et seq.

§ 1628. To render accounts at expiration of term. Within thirty days after the expiration of the time mentioned in the notice to creditors within which claims must be exhibited, every executor or administrator must render a full account and report of his administration. If he fails to present his account, the court or judge must compel the rendering of the account by attachments, and any person interested in the estate may apply for and obtain an attachment; but no attachment must issue unless a citation has been first issued, served, and returned, requiring the executor or administrator to appear and show cause why an attachment should not issue. Every account must exhibit all debts which have been presented and allowed during the period embraced in the account. En. March 11, 1872. Am'd. 1875-6, 104.

Cal. Rep. Cit. 72, 24; 109, 423; 112, 81; 133, 449; 143, 481; 146, 194.

Prob. Act, sec. 228. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 647.

Cal. Rep. Cit. 9, 636; 26, 429; 30, 110; 55, 582.

Account of administration—Final: Post, secs. 1647, 1652. Judge may receive at chambers: Ante, sec. 166.

§ 1629. Executor to account after his authority revoked. When the authority of an executor or administrator ceases, or is revoked for any reason, he may be cited to account before the court at the instance of the person succeeding to the administration of the same estate, in like manner as he might have been cited by any person inter-

ested in the estate during the time he was executor or administrator. En. March 11, 1872. Am'd. 1880, 101.

Cal. Rep. Cit. 52, 637; 74, 539.

Prob. Act, sec. 230. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

§ 1630. Revoking authority of executor, when. If the executor or administrator resides out of the county, or absconds or conceals himself so that the citation cannot be personally served, and neglects to render an account within thirty days after the time prescribed in this article, or if he neglects to render an account within thirty days after being committed where the attachment has been executed, his letters must be revoked. En. March 11, 1872.

Prob. Act, sc. 230. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Compare: Ante, sec. 1439.

§ 1631. To produce and file vouchers, which remain in court. In rendering his account, the executor or administrator must produce and file vouchers for all charges, debts, claims, and expenses which he has paid, which must remain in the court; and he may be examined on oath touching such payments, and also touching any property and effects of the decedent, and the disposition thereof. When any voucher is required for other purposes, it may be withdrawn on leaving a certified copy on file; if a voucher is lost, or for other good reason cannot be produced on the settlement, the payment may be proved by the oath of any competent witness. En. March 11, 1872.

Cal. Rep. Cit. 63, 349; 74, 202; 80, 173; 80, 176.

Prob. Act, sec. 230. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 647.

Vouchers—Required of claimant: Ante, sec. 1494; want of: Post, sec. 1632.

§ 1632. Vouchers for items less than twenty dollars, when accepted. On the settlement of his account he may be allowed any item of expenditure not exceeding twenty dollars, for which no voucher is produced, if such item be supported by his own uncontradicted oath positive to the fact of payment, specifying when, where, and to

whom it was made; but such allowances in the whole must not exceed five hundred dollars against any one estate, and if, upon such settlement of accounts, it appear that debts against the deceased have been paid without the affidavit and allowance prescribed by statute or sections one thousand four hundred and ninety-four, one thousand four hundred and ninety-five, and one thousand four hundred and ninety-six of this code, and it shall be proven by competent evidence to the satisfaction of the court that such debts were justly due, were paid in good faith, that the amount paid was the true amount of such indebtedness over and above all payments or setoffs, and that the estate is solvent, it shall be the duty of the said court to allow the said sum so paid in the settlement of said accounts. En. March 11, 1872. Am'd. 1880, 101.

Cal. Rep. Cit. 63, 650; 72, 340; 80, 173; 80, 176; 92, 294; 115, 33; 127, 187.

Prob. Act, sec. 232. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

§ 1633. Day of settlement to be appointed, and must give notice thereof. Hearing. When any account is rendered for settlement, the clerk of the court must appoint a day for the settlement thereof, and thereupon give notice thereof by causing notices to be posted in at least three public places in the county, setting forth the name of the estate, the executor or administrator, and the day appointed for the settlement of the account. If, upon the final hearing at the time of settlement, the court, or a judge thereof, should deem the notice insufficient from any cause, he may order such further notice to be given as may seem to him proper. En. March 11, 1872. Am'd. 1880, 101; 1891, 428.

Cal. Rep. Cit. 70, 149; 81, 437; 86, 554; 110, 561; 116, 580; 117, 508; 118, 381; 120, 701; 121, 639; 129, 175.

Prob. Act, sec. 233. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 233.

Cal. Rep. Cit. 30, 110.

Proof of notice of settlement: Post, § 1638.

§ 1634. When settlement is final notice must so state. If the account mentioned in the preceding section be for a final settlement, and a petition for the final distribution of the estate be filed with said account, the notice of set-

tlement must state those facts, which notice must be given by posting or publication for at least ten days prior to the day of settlement. On the settlement of said account, distribution and partition of the estate to all entitled thereto may be immediately had without further notice or proceedings. En. March 11, 1872. Am'd. 1873-4, 372; 1875-6, 104; 1891, 428.

Cal. Rep. Cit. 65, 369; 86, 554; 88, 379; 118, 381; 120, 701; 122, 531; 125, 516; 131, 429; 141, 370.

§ 1635. Interested party may file exceptions to account. On the day appointed, or any subsequent day to which the hearing may be postponed by the court, any person interested in the estate may appear and file his exceptions in writing to the account, and contest the same. En. March 11, 1872.

Cal. Rep. Cit. 66, 242; 66, 243; 74, 204; 74, 205; 74, 209; 74, 210; 116, 580; 123, 659; 127, 132; 143, 145; 146, 195.

Prob. Act, sec. 234. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 26, 57; 29, 519; 30, 110.

§ 1636. All matters may be contested by the heirs. Hearing. All matters, including allowed claims not passed upon on the settlement of any former account, or on rendering an exhibit, or on making a decree of sale, may be contested by the heirs, for cause shown. The hearing and allegations of the respective parties may be postponed from time to time, when necessary, and the court may appoint one or more referees to examine the accounts, and make report thereon, subject to confirmation; and may allow a reasonable compensation to the referees, to be paid out of the estate of the decedent. En. March 11, 1872. §1636
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Cal. Rep. Cit. 62, 187; 62, 415; 67, 84; 72, 340; 74, 208; 74, 568; 88, 35; 121, 639; 125, 362; 131, 417; 141, 16; 143, 481; 146, 195.

Prob. Act, sec. 235. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 235.

Cal. Rep. Cit. 37, 426; 131, 417.

Prob. Act, sec. 236. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 236.

Cal. Rep. Cit. 30, 110.

Referees: Ante, secs. 638-645.

§ 1637. **Settlement of accounts to be conclusive, when and when not.** The settlement of the account and the allowance thereof by the court, or upon appeal, is conclusive against all persons in any way interested in the estate, saving, however, to all persons laboring under any legal disability, their right to move for cause to reopen and examine the account, or to proceed by action against the executor or administrator, either individually or upon his bond, at any time before final distribution; and in any action brought by any such person, the allowance and settlement of the account is prima facie evidence of its correctness. En. March 11, 1872. Am'd. 1873-4, 372.

Cal. Rep. Cit. 53, 685; 54, 257; 72, 315; 80, 170; 83, 294; 87, 483; 118, 381; 119, 582; 123, 659; 129, 387; 131, 429; 146, 195.

Prob. Act, sec. 237. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 24, 94; 30, 111; 36, 655; 37, 426; 54, 257.

Conclusiveness of settlement: Post, sec. 1638.

§ 1638. **Proof of notice of settlement of accounts.** The account must not be allowed by the court until it is first proved that notice has been given as required by this chapter, and the decree must show that such proof was made to the satisfaction of the court, and is conclusive evidence of the fact. En. March 11, 1872.

Cal. Rep. Cit. 63, 522; 72, 340; 74, 208; 87, 483; 116, 580.

Prob. Act, sec. 238. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 30, 111.

§ 1639. **In case of death, personal representative to present account.** If any executor or administrator dies, his accounts may be presented by his personal representatives to, and settled by, the court in which the estate of which he was executor or administrator is being administered, and, upon petition of the successor of such deceased executor or administrator, such court may compel the personal representatives of such deceased executor or administrator to render an account of the administration of

their testator or intestate, and must settle such account as in other cases. En. Stats. 1873-4, 373. Rep. 1905, 242. En. 1905, 216.

This is a new section, the matter in the present section 1639 having been transferred to section 1527. The new section authorizes the personal representatives of a deceased executor or administrator to present and have settled the account of such deceased. At present there is no way of settling such accounts except by suit in equity, which is expensive, unnecessary, and less expeditious than the mode proposed.—Code Commissioner's Note.

§ 1640. Moneys invested by order of court. Pending the settlement of any estate, on the petition of any party interested therein, and upon good cause shown therefor, the court may order any moneys in the hands of the executors or administrators to be invested for the benefit of the estate in securities of the United States or of this state. Such order can only be made after publication of notice of the petition in some newspaper, to be designated by the court or a judge thereof. En. Stats. 1873-4, 373. Am'd. 1880, 101.

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Cal. Rep. Cit. 117, 507.

ARTICLE III.

THE PAYMENT OF DEBTS OF THE ESTATE.

- § 1643. Order in which debts to be paid.
- § 1644. Where property insufficient to pay mortgage.
- § 1645. Estate insufficient, a dividend to be paid.
- § 1646. Funeral expenses and expenses of last sickness.
- § 1647. Order for payment of debts and discharge of the executor or administrator.
- § 1648. Provision for disputed and contingent claims.
- § 1649. After decree for payment of debts, executor personally liable to creditors.
- § 1650. Claims not included in order for payment of debts, how disposed of.
- § 1651. Order for payment of legacies and extension of time.
- § 1652. Final accounts, when to be made.
- § 1653. Neglect to render final account, how treated.

§ 1643. Order in which debts to be paid. The debts of the estate, subject to the provisions of section twelve hundred and five, must be paid in the following order:

1. Funeral expenses;
2. The expenses of the last sickness;
3. Debts having preference by the laws of the United States;
4. Judgments rendered against the decedent in his lifetime, and mortgages in the order of their date;

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5. All other demands against the estate. En. March 11, 1872.

Cal. Rep. Cit. 52, 577; 57, 459; 88, 648; 120, 701; 124, 230; 138, 304; 145, 409; 146, 201; 146, 202. Subd. 1—131, 71, Subd. 4—117, 506; 122, 463; 138, 304.

Prob. Act, sec. 239. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 26, 66; 29, 368; 29, 380.

Preferred claims for wages: Ante, sec. 1205.

Family allowance: Ante, sec. 1467; post, sec. 1646.

Mortgaged real estate: Ante, sec. 1569.

§1644 Am'd. p. 503 § 1644. Where property insufficient to pay mortgage. The preference given in the preceding section to a mortgage only extends to the proceeds of the property mortgaged. If the proceeds of such property is insufficient to pay the mortgage, the part remaining unsatisfied must be classed with other demands against the estate.* En. March 11, 1872.

Cal. Rep. Cit. 129, 176; 146, 200; 146, 201; 146, 202.

Prob. Act, sec. 240. En. April 22, 850. Rep. 851, 489. En. 1851, 448.

Proceeds of property mortgaged: Ante, sec. 1569.

§ 1645. Estate insufficient, a dividend to be paid. If the estate is insufficient to pay all the debts of any one class, each creditor must be paid a dividend in proportion to his claim; and no creditor of any one class shall receive any payment until all those of the preceding class are fully paid. En. March 11, 1872.

Cal. Rep. Cit. 57, 459; 58, 405; 58, 515; 61, 72; 146, 201; 146, 202.

Prob. Act, sec. 241. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 26, 66.

§ 1646. Funeral expenses and expenses of last sickness. The executor or administrator, as soon as he has sufficient funds in his hands, must pay the funeral expenses, and expenses of the last sickness, and the allowance made to the family of the decedent. He may retain in his hands the necessary expenses of administration, but he is not obliged to pay any other debts or any legacy until, as prescribed in this article, the payment has been ordered by the court. En. March 11, 1872.

Cal. Rep. Cit. 65, 379; 88, 647; 112, 527; 116, 409; 117, 507; 119, 581; 120, 701.

Prob. Act sec. 242. En. April 22, 1850. Rep. 1851, 489.
En. 1851, 448.

Cal. Rep. Cit. 37, 428.

§ 1647. Order for payment of debts and discharge of the executor or administrator. Upon the settlement of the accounts of the executor or administrator, as required in this chapter, the court must make an order for the payment of the debts, as the circumstances of the estate require. If there is not sufficient funds in the hands of the executor or administrator, the court must specify in the decree the sum to be paid to each creditor. If the whole property of the estate be exhausted by such payment or distribution, such account must be considered as a final account, and the executor or administrator is entitled to his discharge on producing and filing the necessary vouchers and proof showing that such payments have been made, and that he has fully complied with the decree of the court. En. March 11, 1872. Am'd. 1875-6, 104. §1647
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Cal. Rep. Cit. 87, 481; 96, 475; 97, 387; 106, 155; 109, 423; 117, 508; 120, 701; 143, 480; 145, 349.

Prob. Act, sec. 243. En. April 22, 1850. Rep. 1851, 489.
En. 1851, 448. Am'd. 1861, 648.

Cal. Rep. Cit. 18, 431; 26, 431; 30, 111; 37, 428; 37, 429; 55, 582.

Settlement of accounts: Ante, sec. 1628.

§ 1648. Provision for disputed and contingent claims. If there is any claim not due, or any contingent or disputed claim against the estate, the amount thereof, or such part of the same as the holder would be entitled to if the claim were due, established, or absolute, must be paid into the court, and there remain, to be paid over to the party when he becomes entitled thereto; or, if he fails to establish his claim, to be paid over or distributed as the circumstances of the estate require. If any creditor whose claim has been allowed, but is not yet due appears and assents to a deduction therefrom of the legal interest for the time the claim has yet to run, he is entitled to be paid accordingly. The payments provided for in this section are not to be made when the estate is insolvent, unless a pro rata distribution is ordered. En. March 11, 1872.

Cal. Rep. Cit. 58, 405; 58, 515; 61, 72; 67, 640; 96, 475; 96, 476; 106, 155; 146, 200.

Prob. Act, sec. 244. En. April 22, 1850. Rep. 1851, 489.
En. 1851, 448.

Cal. Rep. Cit. 18, 429; 18, 430; 18, 431; 55, 582.

§ 1649. After decree for payment of debts, executor personally liable to creditors. When a decree is made by the court for the payment of creditors, the executor or administrator is personally liable to each creditor for his allowed claim, or the dividend thereon, and execution may be issued on such decree, as upon a judgment in the court, in favor of each creditor, and the same proceeding may be had under such execution as under execution in other cases. The executor or administrator is liable therefor on his bond to each creditor. En. March 11, 1872. Am'd. 1880, 101.

Cal. Rep. Cit. 123, 337; 129, 387; 143, 478.

Prob. Act, sec. 245. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 14, 130; 26, 431; 26, 432.

§ 1650. Claims not included in order for payment of debts, how disposed of. When the accounts of the administrator or executor have been settled, and an order made for the payment of debts and distribution of the estate, no creditor, whose claim was not included in the order for payment, has any right to call upon the creditors who have been paid, or upon the heirs, devisees, or legatees, to contribute to the payment of his claim; but if the executor or administrator has failed to give the notice to the creditors, as prescribed in section fourteen hundred and ninety-one, such creditor may recover on the bond of the executor or administrator the amount of his claim, or such part thereof as he would have been entitled to, had it been allowed. This section shall not apply to any creditor whose claim was not due ten months before the day of settlement, or whose claim was contingent, and did not become absolute ten months before such day. En. March 11, 1872.

Cal. Rep. Cit. 54, 370; 58, 515; 96, 475; 96, 476; 123, 100.

Prob. Act, sec. 246. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 55, 582.

§ 1651. Order for payment of legacies and extension of time. If the whole of the debts have been paid by the first distribution, the court must direct the payment of legacies and the distribution of the estate among the heirs, legatees, or other persons entitled, as provided in the next chapter; but if there be debts remaining unpaid, or if, for other reasons, the estate be not in a proper condition to

be closed, the court must give such extension of time as may be reasonable, for a final settlement of the estate. En. March 11, 1872.

Cal. Rep. Cit. 57, 459; 58, 515; 96, 476; 98, 605; 109, 423.

Prob. Act, sec. 247. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 648.

Cal. Rep. Cit. 31, 111; 55, 582.

§ 1652. **Final account, when to be made.** At the time designated in the last section, or sooner, if within that time all the property of the estate has been sold, or there are sufficient funds in his hands for the payment of all the debts due by the estate, and the estate be in a proper condition to be closed, the executor or administrator must render a final account, and pray a settlement of his administration. En. March 11, 1872.

Cal. Rep. Cit. 109, 423; 122, 45.

Prob. Act, sec. 248. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 648.

Cal. Rep. Cit. 30, 248.

Settlement of accounts: Ante, sec. 1628.

§ 1653. **Neglect to render final account, how treated.** If he neglects to render his account, the same proceedings may be had as prescribed in this chapter in regard to the first account to be rendered by him; and all the provisions of this chapter relative to the last-mentioned account, and the notice and settlement thereof, apply to his account presented for final settlement. En. March 11, 1872.

Prob. Act, sec. 249. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 9, 636; 30, 111.

Proceedings to enforce account: Ante, secs. 1628-1630.

CHAPTER XI.

OF THE PARTITION, DISTRIBUTION, AND FINAL SETTLEMENT OF ESTATES.

- Article I. Partial Distribution Prior to Final Settlement, §§ 1658-1663.
 II. Distribution on Final Settlement, §§ 1664-1670.
 III. Distribution and Partition, §§ 1675-1686.
 IV. Agents for Absent Interested Parties. Discharge of Executor or Administrator, §§ 1691-1698.
 V. Accounts of Trustees. Distribution, §§ 1699-1703½.

ARTICLE I.

PARTIAL DISTRIBUTION PRIOR TO FINAL SETTLEMENT.

- § 1658. Payment of legacies upon giving bonds.
 § 1659. Notice of application for legacies.
 § 1660. Executor or other person may resist application.
 § 1661. Decree prayed for to require bond, which must be given.
 May order whole or part of share to be delivered. Where partition necessary, how made. Costs.
 § 1662. Order for payment of bond, and suit thereon.
 § 1663. Any heir, devisee, or legatee may petition the court for distribution of net proceeds. Order of court. Bond.

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§ 1658. Payment of legacies upon giving bonds. At any time after the lapse of four months from the issuing of letters testamentary or of administration, any heir, devisee, or legatee, may present his petition to the court for the legacy or share of the estate to which he is entitled, to be given to him upon his giving bonds, with security, for the payment of his proportion of the debts of the estate. En. March 11, 1872.

Cal. Rep. Cit. 57, 459; 63, 107; 65, 380; 74, 312; 81, 437; 105, 371; 107, 594; 110, 561; 115, 639; 119, 408; 121, 127; 121, 393; 121, 394; 122, 530; 122, 531; 132, 564; 133, 658.

Prob. Act, sec. 250. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 648.

Cal. Rep. Cit. 14, 112; 31, 618; 31, 619.

Payment of legacies—Order of appropriation for: Civ. Code, sec. 1360.

Proportion of the debts—For which legatee, etc., liable: Civ. Code, sec. 1377; see ante, sec. 1650.

Partial distribution: Post, sec. 1661.

§ 1659. Notice of application for legacies. Notice of the application must be given to the executor or administrator,

personally, and to all persons interested in the estate, in the same manner that notice is required to be given of the settlement of the account of an executor or administrator. En. March 11, 1872.

Cal. Rep. Cit. 81, 437; 110, 561.

Prob. Act, sec. 251. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 648.

Notice of settlement of account: Ante, sec. 1633.

§ 1660. **Executor or other person may resist application.** The executor or administrator, or any person interested in the estate, may appear at the time named and resist the application, or any other heir, devisee, or legatee may make a similar application for himself. En. March 11, 1872. §1660 Am'd. p. 504

Cal. Rep. Cit. 63, 107; 110, -561.

Prob. Act, sec. 252. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Any person interested: Ante, sec. 1635.

§ 1661. **Decree prayed for to require bond, which must be given.** May order whole or part of share to be delivered. Where partition necessary, how made. Costs. If, at the hearing, it appear that the estate is but little indebted, and that the share of the party applying may be allowed to him without loss to the creditors of the estate the court must make an order in conformity with the prayer of applicant, requiring; §1661 Am'd. p. 504

1. Each heir, legatee, or devisee, obtaining such order, before receiving his share, or any portion thereof, to execute and deliver to the executor or administrator a bond, in such sum as shall be designated by the court, or a judge thereof, with sureties to be approved by the judge, payable to the executor or administrator, and conditioned for the payment, whenever required, of his proportion of the debts due from the estate, not exceeding the value or amount of the legacy or portion of the estate to which he is entitled.

2. The executor or administrator to deliver to the heir, legatee, or devisee, the whole portion of the estate to which he may be entitled, or only a part thereof, designating it. If, in the execution of the order, a partition is necessary between two or more of the parties interested, it

must be made in the manner hereinafter prescribed. The costs of these proceedings shall be paid by the applicant, or if there be more than one, shall be apportioned equally amongst them. En. March 11, 1872. Am'd. 1880, 102.

Cal. Rep. Cit. 58, 515; 63, 107; 65, 379; 65, 380; 105, 371; 121, 127; 121, 394; 145, 466; 147, 255.

Prob. Act, sec. 253. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 14, 112; 20, 628.

Prob. Act, sec. 254. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 20, 628.

Prob. Act, sec. 255. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Prob. Act, sec. 256. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Order—Not made if any taxes unpaid: Post, sec. 1669; recording: Post, sec. 1719.

Partition—Manner hereinafter prescribed: Post, secs. 1675 et seq.

§ 1662. Order for payment of bond, and suit thereon. When any bond has been executed and delivered under the provisions of the preceding section, and it is necessary for the settlement of the estate to require the payment of any part of the money thereby secured, the executor or administrator must petition the court for an order requiring the payment, and have a citation issued and served on the party bound, requiring him to appear and show cause why the order should not be made. At the hearing, the court, if satisfied of the necessity of such payment, must make an order accordingly, designating the amount and giving a time within which it must be paid. If the money is not paid within the time allowed, an action may be maintained by the executor or administrator on the bond. En. March 11, 1872.

Prob. Act, sec. 257. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 31, 618; 31, 619.

§1663 Repl'd p. 504 § 1663. Any heir, devisee, or legatee may petition the court for distribution of net proceeds. Order of court. Bond. At any time after the lapse of one year from the

issuance of letters testamentary, or of administration, any heir, devisee, or legatee may present his or her petition to the court for the distribution of the net proceeds of the share of the said estate to which he or she will be entitled. Notice of the application must be given, as required by section sixteen hundred and fifty-nine. The executor or administrator, or any other person interested in the estate, may appear at the time named and resist the application, or any other heir, devisee, or legatee may make a similar application for himself. If at the hearing it appear that the estate is but little indebted, and that the share of the party applying may be allowed to him without loss to the creditors of the estate, the court must make an order in conformity with the prayer of the applicant, requiring:

1. Each heir, legatee, or devisee, obtaining such order, before receiving his share, or any portion thereof, to execute and deliver to the executor or administrator a bond, in such sum as shall be designated by the court, or a judge thereof, with sureties to be approved by the judge, payable to the executor or administrator, and conditioned for the payment, whenever required, of his proportion of the debts due from the estate, not exceeding the amount or portion of the proceeds of the estate which he has received; provided, that where the time for filing or presenting claims has expired, and all claims that have been allowed have been paid, or are secured by mortgage upon real estate sufficient to pay them, and the court is satisfied that no injury can result to the estate, the court may dispense with the bond.

2. The executor or administrator to deliver to the heir, legatee, or devisee the proceeds of the estate to which he may be entitled, or only a part thereof, designating it. If, in the opinion of the court, it be necessary, in order to ascertain the proceeds that any or all of the heirs, legatees, or devisees may be entitled [to] that the interest of any heir, legatee, or devisee in one or more pieces or parcels of property of the estate shall be determined or ascertained, the court may suspend proceedings and direct the petitioner or petitioners to take proceedings under section sixteen hundred and sixty-four of this code to ascertain the interest the petitioner or petitioners will have under the will in any piece or parcel of property. The order must describe the property in relation to which proceedings are to be taken. Whenever any bond has been executed and delivered, pro-

ceedings upon any such bond may be taken under section sixteen hundred and sixty-two. The cost of these proceedings shall be paid by the applicant, or if there be more than one, shall be apportioned equally between them. En. Stats. 1889, 92.

Cal. Rep. Cit. 105, 371; 109, 423; 115, 639; 121, 127; 121, 131; 121, 392; 121, 394; 126, 251; 126, 252.

ARTICLE II.

DISTRIBUTION ON FINAL SETTLEMENT.

- § 1664. Proceedings in the nature of an action to determine heirship.
- § 1665. Distribution of estate, how made and to whom.
- § 1666. What the decree must contain, and is final.
- § 1667. Proceedings for distribution of estates of deceased persons.
- § 1668. Decree to be made only after notice.
- § 1669. No distribution made till taxes are paid.
- § 1670. Continuation of administration.

§ 1664. Proceedings in the nature of an action to determine heirship. In all estates now being administered, or that may hereafter be administered, any person claiming to be heir to the deceased, or entitled to distribution in whole or in any part of such estate, may, at any time after the expiration of one year from the issuing of letters testamentary or of administration upon such estate, file a petition in the matter of such estate, praying the court to ascertain and declare the rights of all persons to said estate and all interests therein, and to whom distribution thereof should be made. Upon the filing of such petition, the court shall make an order directing service of notice to all persons interested in said estate to appear and show cause, on a day to be therein named, not less than sixty days nor over four months from the date of the making of such order, in which notice shall be set forth the name of the deceased, the name of the executor or administrator of said estate, the names of all persons who may have appeared claiming any interest in said estate in the course of the administration of the same, up to the time of the making of said order, and such other persons as the court may direct, and also a description of the real estate whereof

said deceased died seised or possessed, so far as known, described with certainty to a common intent, and requiring all said persons and all persons named or not named, having or claiming any interest in the estate of said deceased, at the time and place in said order specified, to appear and exhibit, as hereinafter provided, their respective claims of heirship, ownership, or interest in said estate, to said court, which notice shall be served in the same manner as a summons in a civil action, upon proof of which service, by affidavit or otherwise, to the satisfaction of the court, the court shall thereupon acquire jurisdiction to ascertain and determine the heirship, ownership, and interest of all parties in and to the property of said deceased, and such determination shall be final and conclusive in the administration of said estate and the title and ownership of said property. The court shall enter an order or decree establishing proof of the service of such notice. All persons appearing within the time limited, as aforesaid, shall file their written appearance in person or through their authorized attorney, such attorney filing at the same time written evidence of his authority to so appear, entry of which appearance shall be made in the minutes of the court and in the register of proceedings of said estate. And the court shall, after the expiration of the time limited for appearing as aforesaid, enter an order adjudging the default of all persons for not appearing as aforesaid, who shall not have appeared as aforesaid. At any time within twenty days after the date of the order or decree of the court establishing proof of the service of such notice, any of such persons so appearing may file his complaint in the matter of the estate, setting forth the facts constituting his claim of heirship, ownership, or interest in said estate, with such reasonable particularity as the court may require, and serve a copy of the same upon each of the parties or attorneys who shall have entered their written appearance as aforesaid, if such parties or such attorneys reside within the county; and in case any of them do not reside within the county, then service of such copy of said complaint shall be made upon the clerk of said court for them, and the clerk shall forthwith mail the same to the address of such party or attorney as may have left with said clerk his postoffice address. Such parties are allowed twenty days after the service of the complaint, as aforesaid, within which to plead thereto, and thereafter such proceedings shall be had upon such complaint as in this code provided

in case of an ordinary civil action; and the issues of law and of fact arising in the proceeding shall be disposed of in like manner as issues of law and fact are herein provided to be disposed of in civil actions, with a like right to a motion for a new trial and appeal to the supreme court; and the provisions in this code contained regulating the mode of procedure for the trial of civil actions, the motion for a new trial of civil actions, statements on motion for a new trial, bills of exception, and statements on appeal, as also in regard to undertakings on appeal, and the mode of taking and perfecting appeals, and the time within which such appeals shall be taken, shall be applicable thereto; provided, however, that all appeals herein must be taken within sixty days from the date of the entry of the judgment or the order complained of. The party filing the petition as aforesaid, if he file a complaint, and if not, the party first filing such complaint, shall, in all subsequent proceedings, be treated as the plaintiff therein, and all other parties so appearing shall be treated as the defendants in said proceedings, and all such defendants shall set forth in their respective answers the facts constituting their claim of heirship, ownership, or interest in said estate, with such particularity as the court may require, and serve a copy thereof on the plaintiff. Evidence in support of all issues may be taken orally or by deposition, in the same manner as provided in civil actions. Notice of the taking of such depositions shall be served only upon the parties or the attorneys of the parties so appearing in said proceeding. The court shall enter a default of all persons failing to appear, or plead, or prosecute, or defend their rights, as aforesaid; and upon the trial of the issues arising upon the pleadings in such proceeding, the court shall determine the heirship to said deceased, the ownership of his estate, and the interest of each respective claimant thereto or therein, and persons entitled to distribution thereof, and the final determination of the court thereupon shall be final and conclusive in the distribution of said estate, and in regard to the title to all the property of the estate of said deceased. The cost of the proceedings under this section shall be apportioned in the discretion of the court. In any proceeding under this section, the court may appoint an attorney for any minor mentioned in said proceedings not having a guardian. Nothing in this section contained shall be construed to exclude the right upon final distribution of any estate to contest the question of heirship, title, or in-

terest in the estate so distributed, where the same shall not have been determined under the provisions of this section; but where such questions shall have been litigated under the provisions of this section, the determination thereof, as herein provided shall be conclusive in the distribution of said estate. En. Stats. 1885, 208.

Cal. Rep. Cit. 73, 281; 73, 296; 73, 297; 78, 110; 78, 111; 78, 112; 78, 113; 81, 415; 81, 438; 81, 439; 81, 572; 88, 378; 88, 379; 88, 381; 89, 32; 93, 460; 93, 461; 93, 462; 93, 463; 93, 464; 96, 113; 96, 114; 96, 557; 102, 256; 102, 258; 102, 259; 102, 262; 108, 125; 110, 227; 110, 228; 110, 232; 110, 233; 112, 692; 112, 693; 115, 641; 118, 663; 121, 72; 122, 530; 122, 532; 123, 168; 124, 155; 127, 497; 127, 505; 127, 506; 129, 176; 133, 492; 133, 493; 133, 494; 133, 495; 135, 674; 135, 677; 137, 299; 137, 478; 141, 34; 141, 40; 141, 352; 141, 353; 143, 489; 143, 490; 143, 491; 143, 492; 147, 83.

Distribution not to be granted until taxes paid: See post, sec. 1669; Pol. Code, sec. 3752.

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§ 1665. Distribution of estate, how made and to whom. Upon a final settlement of the accounts of the executor or administrator, or at any subsequent time, upon the application of the executor or administrator, or of any heir, legatee, or devisee, the court must proceed to distribute the residue of the estate in the hands of the executor or administrator, if any, among the persons who by law are entitled thereto; and if the decedent has left a surviving child, and the issue of other children, and any of them, before the close of administration, have died while under age and not having been married, no administration on such deceased child's estate is necessary, but all the estate which such deceased child was entitled to by inheritance must, without administration, be distributed to the other heirs at law. A statement of any receipts and disbursements of the executor or administrator, since the rendition of his final accounts, must be reported and filed at the time of making such distribution, and a settlement thereof, together with an estimate of the expenses of closing the estate, must be made by the court and included in the order or decree; or the court or judge may order notice of the settlement of such supplementary account, and refer the same as in other cases of the settlement of accounts. En. March 11, 1872.

Cal. Rep. Cit. 51, 569; 52, 96; 54, 210; 57, 423; 57, 459; 58, 114; 58, 518; 58, 575; 63, 523; 74, 515; 88, 379; 93, 463; 107, 594; 116, 361; 119, 557; 120, 142; 122, 530; 122, 531; 129, 175; 136, 419; 137, 356; 141, 371; 143, 197; 143, 202; 143, 204.

Prob. Act, sec. 258. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 649; 1866, 329.

Cal. Rep. Cit. 20, 628.

Notice of settlement of account: Ante, sec. 1633.

Distribution of property of absentee: Post, sec. 1693.

§ 1666. What the decree must contain, and is final. In the order of decree, the court must name the persons and the proportions or parts to which each shall be entitled, and such persons may demand, sue for, and recover their respective shares from the executor or administrator, or any person having the same in possession. Such order or decree is conclusive as to the rights of heirs, legatees, or devisees, subject only to be reversed, set aside, or modified on appeal. En. March 11, 1872.

Cal. Rep. Cit. 54, 23; 54, 305; 58, 114; 63, 457; 64, 332; 74, 515; 74, 525; 74, 526; 82, 71; 100, 407; 102, 10; 102, 542; 112, 400; 116, 361; 119, 147; 119, 151; 119, 557; 119, 570; 121, 444; 122, 77; 122, 113; 122, 484; 131, 76; 137, 357; 141, 371; 143, 197; 143, 202; 143, 204; 144, 464; 144, 669.

Prob. Act, sec. 259. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1866, 766.

Cal. Rep. Cit. 20, 628.

Recording: Post, sec. 1719; taxes payable before: Post, sec. 1669.

Subsequent issue of letters—On discovery of estate: Sec. 1698.

§ 1667. Proceedings for distribution of estates of deceased persons. Upon application for distribution, after final settlement of the accounts of administration, if the decedent was a nonresident of this state, leaving a will which has been duly proved or allowed in the state of his residence, and an authenticated copy thereof has been admitted to probate in this state, and it is necessary, in order that the estate, or any part thereof, may be distributed

according to the will, that the estate in this state should be delivered to the executor or administrator in the state or place of his residence, the court may order such delivery to be made, and, if necessary, order a sale of the real estate, and a like delivery of the proceeds. The delivery, in accordance with the order of the court, is a full discharge of the executor or administrator with the will annexed, in this state, in relation to all property embraced in such order, which, unless reversed on appeal, binds and concludes all parties in interest. Sales of real estate, ordered by virtue of this section, must be made in the same manner as other sales of real estate of decedents by order of the court. En. March 11, 1872. Am'd. 1880, 102.

Cal. Rep. Cit. 63, 456; 66, 435; 70, 407; 81, 521; 86, 553.

Sales of real estate: Secs. 1536 et seq.

§ 1668. Decree to be made only after notice. The order or decree may be made on the petition of the executor or administrator, or of any person interested in the estate. When such petition is filed the clerk of the court must set the petition for hearing by the court and give notice thereof by causing notices to be posted in at least three public places in the county, setting forth the name of the estate, the executor or administrator, and the time appointed for the hearing of the petition. If, upon the hearing of the petition, the court, or a judge thereof, should deem the notice insufficient from any cause, he may order such further notice to be given as may seem to him proper. If partition be applied for, as provided in this chapter, the decree of distribution shall not divest the court of jurisdiction to order partition, unless the estate is finally closed. En. March 11, 1872. Am'd. 1873-4, 373; 1893, 71.

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Cal. Rep. Cit. 58, 515.

Prob. Act, sec. 260. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 649.

§ 1669. Distribution of estate not to be made until taxes are paid. Before any decree of distribution of an estate is made, the court must be satisfied, by the oath of the executor or administrator, or otherwise, that all state, county and municipal taxes, legally levied upon property of the estate, and any inheritance tax which is due and payable have been fully paid. En. March 11, 1872. Am'd. 1880, 102; 1905, 83.

Cal. Rep. Cit. 58, 515; 71, 207; 133, 184.

Similar provision: Pol. Code, sec. 3752.

§ 1670. Continuation of administration. In all cases where a decedent shall have left a will in and by the terms of which the testator shall have limited the time for administration upon an estate left by him, and the executor and all of the legatees or devisees named in the will shall file and present to the court a petition, in writing, representing that it will be for the best interests of the estate and of the beneficiaries under the will to have the administration upon the estate continued for a longer period of time than that designated in such will, and that it would be injurious to the estate and to such beneficiaries to have the administration brought to a close at the date therefor designated in the will, the court shall then set a day for the hearing of said petition; and notice thereof shall be served on all persons interested in the estate, in the same manner that summons in civil actions is served. Upon the day set for such hearing (or upon some other day to which the hearing may have been continued), the court shall proceed to hear proofs touching the representations made in such petition—and any person interested in the estate may also present counter-proofs in opposition to said application; and if, upon such hearing, it be made to appear to the court that the representations made by the petitioners in their said petition contained be true, the court may then, by its order and decree in that behalf, decree and direct that the administration upon the estate continue for and during such further period of time as in its judgment will best subserve the interests of the estate and of the beneficiaries under said will; provided, however, that if, at any time during the period for which the administration upon the estate shall have been thus continued, the executor, or any one or more of the legatees or devisees, shall present to the court his or their petition, representing that it has become necessary for the best interests of the estate and of the beneficiaries under the will to have the administration upon the estate closed, the court shall then set a day for the hearing of said last-named petition; and notice thereof shall be given in the same manner, and the same proceedings be had thereupon, as shall have been given for and had upon the hearing of the petition asking for the continuation of such administration. And if, upon such hearing, it shall be made to ap-

pear to the court that the representations made by such petitioners or petitioner (as the case may be) are true, the court shall then, by its order and decree in that behalf, decree and direct that the administration upon the estate be closed as soon thereafter as, under the circumstances, shall be practicable. En. Stats. 1891, 423.

ARTICLE III.

DISTRIBUTION AND PARTITION.

- § 1675. Estate in common Commissioners.
- § 1676. Partition and notice thereof, and the time of filing petition.
- § 1677. Estate in different counties, how divided.
- § 1678. Partition may be made, although some of the heirs, etc., have parted with their interest.
- § 1679. Shares to be set out by metes and bounds.
- § 1680. Whole estate may be assigned to one, in certain cases.
- § 1681. Payments for equality of partition, by whom and how.
- § 1682. Estate may be sold.
- § 1683. To give notice to all persons and guardians before partition. Duties of commissioners.
- § 1684. To make report, and partition to be recorded.
- § 1685. When commissioners to make partition are not necessary.
- § 1686. Advancements made to heirs.

§ 1675. Estate in common. Commissioners. When the estate, real or personal, assigned by the decree of distribution to two or more heirs, devisees, or legatees, is in common and undivided, and the respective shares are not separated and distinguished, partition or distribution may be made by three disinterested persons, to be appointed commissioners for that purpose by the court, who must be duly sworn to the faithful discharge of their duties, a certified copy of the order of their appointment, and of the order or decree assigning and distributing the estate must be issued to them as their warrant, and their oath must be indorsed thereon. Upon consent of the parties, or when the court deems it proper and just, it is sufficient to appoint one commissioner only, who has the same authority and is governed by the same rules as if three were appointed. En. March 11, 1872. Am'd. 1880, 103.

Cal. Rep. Cit. 80, 496; 102, 8; 102, 10; 124, 432; 126, 483.

Prob. Act, sec. 261. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 649.

§ 1676. Partition and notice thereof, and the time of filing petition. Such partition may be ordered and had in the superior court on the petition of any person interested. But before commissioners are appointed, or partition ordered by the court as directed in this chapter, notice thereof must be given to all persons interested who reside in this state, or to their guardians, and to the agents, attorneys, or guardians, if any in this state, of such as reside out of this state, either personally or by public notice, as the court may direct. The petition may be filed, attorneys, guardians, and agents appointed, and notice given at any time before the order or decree of distribution, but the commissioners must not be appointed until the order or decree is made distributing the estate. En. March 11, 1872. Am'd. 1880, 103.

Cal. Rep. Cit. 102, 10; 102, 11.

Prob. Act, sec. 263. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 650.

§ 1677. Estate in different counties, how divided. If the real estate is in different counties, the court may, if deemed proper, appoint commissioners for all, or different commissioners for each county. The estate in each county must be divided separately among the heirs, devisees, or legatees, as if there was no other estate to be divided, but the commissioners first appointed must, unless otherwise directed by the court, make division of such real estate wherever situated within this state. En. March 11, 1872. Am'd. 1880, 103.

Cal. Rep. Cit. 102, 11.

Prob. Act, sec. 262. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 649.

§ 1678. Partition may be made, although some of the heirs, etc., have parted with their interest. Partition or distribution of the real estate may be made as provided in this chapter, although some of the original heirs, legatees, or devisees may have conveyed their shares to other persons, and such shares must be assigned to the person holding the same, in the same manner as they otherwise would have been to such heirs, legatees, or devisees. En. March 11, 1872.

Cal. Rep. Cit. 58, 114; 74, 515; 74, 516; 82, 71; 92, 194; 102, 9; 116, 362; 125, 461; 125, 462; 137, 357; 137, 358; 141, 359; 141, 370; 141, 371.

Prob. Act, sec. 264. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 18, 98.

§ 1679. Shares to be set out by metes and bounds. When both distribution and partition are made, the several shares in the real and personal estate must be set out to each individual in proportion to his right, by metes and bounds, or description, so that the same can be easily distinguished, unless two or more of the parties interested consent to have their shares set out so as to be held by them in common and undivided. En. March 11, 1872.

Prob. Act, sec. 265. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

§ 1680. Whole estate may be assigned to one, in certain cases. When the real estate cannot be divided without prejudice or inconvenience to the owners, the court may assign the whole to one or more of the parties entitled to share therein, who will accept it, always preferring the males to the females, and among children, preferring the elder to the younger. The parties accepting the whole must pay to the other parties interested their just proportion of the true value thereof, or secure the same to their satisfaction, or in case of the minority of such party, then to the satisfaction of his guardian; and the true value of the estate must be ascertained and reported by the commissioners. When the commissioners appointed to make partition are of the opinion that the real estate cannot be divided without prejudice or inconvenience to the owners, they must so report to the court, and recommend that the whole be assigned as herein provided, and must find and report the true value of such real estate. On filing the report of the commissioners, and on making or securing the payment as before provided, the court, if it appears just and proper, must confirm the report, and thereupon the assignment is complete, and the title to the whole of such real estate vests in the person to whom the same is so assigned. En. March 11, 1872. Am'd. 1880, 103.

Prob. Act, sec. 266. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 650; 1864, 371.

§ 1681. **Payments for equality of partition, by whom and how.** When any tract of land or tenement is of greater value than any one's share in the estate to be divided, and cannot be divided without injury to the same, it may be set off by the commissioners appointed to make partition to any of the parties who will accept it, giving preference as prescribed in the preceding section. The party accepting must pay or secure to the others such sums as the commissioners shall award to make the partition equal and the commissioners must make their award accordingly; but such partition must not be established by the court until the sums awarded are paid to the parties entitled to the same, or secured to their satisfaction. En. March 11, 1872.

Prob. Act, sec. 267. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

§ 1682. **Estate may be sold.** When it appears to the court, from the commissioners' report, that it cannot otherwise be fairly divided and should be sold, the court may order the sale of the whole or any part of the estate, real or personal, by the executor or administrator, or by a commissioner appointed for that purpose and the proceeds distributed. The sale must be conducted, reported, and confirmed, in the same manner and under the same requirements provided in article four, chapter seven of this title. En. March 11, 1872.

Prob. Act, sec. 268. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 650.

§ 1683. **To give notice to all persons and guardians before partition. Duties of commissioners.** Before any partition is made or any estate divided, as provided in this chapter, notice must be given to all persons interested in the partition, their guardians, agents, or attorneys, by the commissioners, of the time and place when and where they shall proceed to make partition. The commissioners may take testimony, order surveys, and take such other steps as may be necessary to enable them to form a judgment upon the matters before them. En. March 11, 1872.

Cal. Ren. Cit. 162, 2.

Prob. Act, sec. 270. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 651.

§ 1684. To make report, and partition to be recorded. The commissioners must report their proceedings, and the partition agreed upon by them, to the court, in writing, and the court may, for sufficient reasons, set aside the report and commit the same to the same commissioners, or appoint others; and when such report is finally confirmed, a certified copy of the judgment, or decree of partition made thereon, attested by the clerk under the seal of the court, must be recorded in the office of the recorder of the county where the lands lie. En. March 11, 1872. Am'd. 1880, 104.

Prob. Act, sec. 271. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 651.

§ 1685. When commissioners to make partition are not necessary. When the court makes a judgment or decree assigning the residue of any estate to one or more persons entitled to the same, it is not necessary to appoint commissioners to make partition or distribution thereof, unless the parties to whom the assignment is decreed, or some of them, request that such partition be made. En. March 11, 1872. Am'd. 1880, 104.

Prob. Act, sec. 272. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

§ 1686. Advancements made to heirs. All questions as to advancements made, or alleged to have been made, by the decedent to his heirs, may be heard and determined by the court, and must be specified in the decree assigning and distributing the estate; and the final judgment or decree of the court, or in case of appeal, of the supreme court, is binding on all parties interested in the estate. En. March 11, 1872. Am'd. 1880, 104.

Cal. Rep. Cit. 58, 515; 80, 496; 102, 9.

Prob. Act, sec. 275. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 651.

ARTICLE IV.

AGENTS FOR ABSENT INTERESTED PARTIES. DISCHARGE OF EXECUTOR OR ADMINISTRATOR.

- § 1691. Court may appoint agent to take possession for absentees.
- § 1692. Agent to give bond, and his compensation.
- § 1693. Unclaimed estate, how disposed of.
- § 1694. When real and personal property of absentee to be sold.
- § 1695. Liability of agent on his bond.
- § 1696. Certificate to claimant.
- § 1697. Final settlement, decree, and discharge.
- § 1698. Discovery of property.

§ 1691. Court may appoint agent to take possession for absentees. When any estate is assigned or distributed by a judgment or decree of the court, as provided in this chapter, to any person residing out of, and having no agent in this state, and it is necessary that some person should be authorized to take possession and charge of the same for the benefit of such absent person, the court may appoint an agent for that purpose and authorize him to take charge of such estate, as well as to act for such absent person in the distribution; provided, that if such estate be in money when so assigned or distributed, the executor or administrator of such estate may deposit the share of each person, and in the name of said person, as far as known, as designated in said assignment or decree of distribution, with the county treasurer of the county in which said estate is being probated, and shall give a receipt for the same, and be liable upon his official bond therefor; and said receipt shall be deemed and received by the court or judge thereof as a voucher in favor of said executor or administrator, with the same force and effect as if executed by such assignee, legatee, or distributee; and said section as amended shall be applicable to any and all estates now pending in which a decree of final discharge has not been granted. En. March 11, 1872. Am'd. 1895, 75.

Cal. Rep. Cit. 58, 515.

Prob. Act, sec. 274. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

§ 1692. Agent to give bond, and his compensation. The agent must execute a bond to the state of California, to be approved by the court, or a judge thereof, conditioned that

he shall faithfully manage and account for the estate. The court appointing such agent may allow a reasonable sum out of the profits of the estate for his services and expenses. En. March 11, 1872. Am'd. 1880, 104.

Cal. Rep. Cit. 117, 646.

Prob. Act, sec. 275. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

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§ 1693. Unclaimed estate, how disposed of. When personal property remains in the hands of the agent unclaimed for a year, and it appears to the court that it is for the benefit of those interested, it shall be sold under the order of the court, and the proceeds, after deducting the expenses of the sale allowed by the court, must be paid into the state treasury. When the payment is made, the agent must take from the treasury duplicate receipts, one of which he must file in the office of the controller and the other in the court. En. March 11, 1872. Am'd. 1880, 104.

Cal. Rep. Cit. 76, 652.

Prob. Act, sec. 276. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Unclaimed property: Ante, secs. 1269-1272.

§ 1694. When real and personal property of absentee to be sold. The agent must render the court appointing him, annually, an account showing:

1. The value and character of the property received by him, what portion thereof is still on hand, what sold, and for what.

2. The income derived therefrom.

3. The taxes and assessments imposed thereon, for what, and whether paid or unpaid.

4. Expenses incurred in the care, protection, and management thereof, and whether paid or unpaid. When filed, the court may examine witnesses and take proofs in regard to the account; and if satisfied from such accounts and proofs that it will be for the benefit and advantage of the persons interested therein, the court may, by order, direct a sale to be made of the whole or such parts of the real or personal property as shall appear to be proper, and the purchase money to be deposited in the state treasury. En. March 11, 1872. Am'd. 1880, 105.

§ 1695. **Liability of agent on his bond.** The agent is liable on his bond for the care and preservation of the estate while in his hands, and for the payment of the proceeds of the sale as required in the preceding sections, and may be sued thereon by any person interested. En. March 11, 1872.

Prob. Act, sec. 277. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

§ 1696. **Certificate to claimant.** When any person appears and claims the money paid into the treasury, the court making the distribution must inquire into such claim, and being first satisfied of his right thereto, must grant him a certificate to that effect, under its seal; and upon the presentation of the certificate to him, the controller must draw his warrant on the treasurer for the amount. En. March 11, 1872. Am'd. 1880, 105.

Prob. Act, sec. 278. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

§ 1697. **Final settlement, decree, and discharge.** When the estate has been fully administered, and it is shown by the executor or administrator, by the production of satisfactory vouchers, that he has paid all sums of money due from him, and delivered up, under the order of the court, all the property of the estate to the parties entitled, and, performed all the acts lawfully required of him, the court must make a judgment or decree discharging him from all liability to be incurred thereafter. En. March 11, 1872.

Cal. Rep. Cit. 54, 305; 60, 259; 63, 475; 63, 476; 93, 463; 112, 294; 129, 305; 134, 29; 143, 228; 143, 234; 145, 349.

Prob. Act, sec. 279. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 651.

Cal. Rep. Cit. 36, 654; 36, 655; 51, 151.

§ 1698. **Discovery of property.** The final settlement of an estate, as in this chapter provided, shall not prevent a subsequent issue of letters testamentary, or of administration, or of administration with the will annexed, if other property of the estate be discovered, or if it become necessary or proper for any cause that letters should be again issued. En. March 11, 1872. Am'd. 1873-4, 373.

Cal. Rep. Cit. 57, 388; 136, 370.

Prob. Act, sec. 280. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 651; 1872, 85.

ARTICLE V.

[New article added March 19, 1889; Stats. 1889, p. 337. In effect immediately.]

ACCOUNTS OF TRUSTEES—DISTRIBUTION.

- § 1699. Superior court not to lose jurisdiction by final distribution.
- § 1700. Compensation of trustees.
- § 1701. Appeal from decree settling account.
- § 1702. Trustee may decline. Resignation of executor. Appointment by court.
- § 1703. Jurisdiction.
- § 1703½. Distribution to treasurer.

§ 1699. Superior court not to lose jurisdiction by final distribution. Where any trust has been created by or under any will to continue after distribution, the superior court shall not lose jurisdiction of the estate by final distribution, but shall retain jurisdiction thereof for the purpose of the settlement of accounts under the trusts. And any trustee created by any will, or appointed to execute any trust created by any will, may, from time to time, pending the execution of his trust, or may, at the termination thereof, render and pray for the settlement of his accounts as such trustee, before the superior court in which the will was probated, and in the manner provided for the settlement of the accounts of executors and administrators. The trustee, or, in the case of his death, his legal representatives, shall, for that purpose, present to the court his verified petition, setting forth his accounts in detail, with a report showing condition of trust estate, together with a verified statement of said trustee, giving the names and postoffice addresses, if known, of the cestuis que trust, and, upon the filing thereof, the court, or judge, shall fix a day for the hearing. The clerk must thereupon give notice thereof of not less than ten days, by causing notices to be posted in at least three public places in the county, setting forth the name of the trust estate, the trustee, and the day appointed for the settlement of the account. The court, or a judge thereof, may order such further notice to be given as may be proper. Such trustee may, in the discretion of the court, upon application of any beneficiary of the trust, or the

guardian of such beneficiary, be ordered to appear and render his account, after being cited by service of citation, as provided for the service of summons in civil cases, and such application shall not be denied where no account has been rendered to the court within six months prior to such application. Upon the filing of the account so ordered, the same proceedings for the hearing and settlement thereof shall be had as hereinabove provided. En. Stats. 1889, 337. Am'd. 1895, 64; 1900-01, 47.

Cal. Rep. Cit. 107, 595; 128, 684; 133, 495; 145, 346; 145, 347; 145, 350.

§ 1700. **Compensation of trustees.** On all such accountings the court shall allow the trustee or trustees the proper expenses and such compensation for services as the court may adjudge to be just and reasonable, and shall apportion such compensation among the trustees according to the services rendered by them respectively, and may in its discretion fix a yearly compensation for the trustee or trustees to continue as long as the court may judge proper. En. Stats. 1889, 338.

§ 1701. **Appeal from decree settling account.** From a decree settling such account appeal may be taken in the manner provided for an appeal from a decree settling the account of an executor or administrator. The decree of the superior court, if affirmed on appeal or becoming final without appeal, shall be conclusive. En. Stats. 1889, 338.

§ 1702. **Trustee may decline. Resignation of executor. Appointment by court.** Any person named or designated as a trustee in any will which has been or shall hereafter be admitted to probate in this state may, at any time before final distribution, decline to act as such trustee, and an order of court shall thereupon be made accepting such resignation; but the declination of any such person who has qualified as executor shall not be accepted by the court, unless the same shall be in writing and filed in the matter of the estate in the court in which the administration is pending, and such notice shall be given thereof as is required upon a petition praying for letters of administration. The court in which the administration is pending shall have power at any time before final distribution to appoint some fit and proper person to fill any

vacancy in the office of trustee under the will, whether resulting from such declination, removal, or otherwise; provided, it shall be required by law or necessary to carry out the trust created by the will, that such vacancy shall be filled; and every person so appointed shall, before acting as trustee, give a bond such as is required by section one thousand three hundred and eighty-eight of this code, of a person to whom letters of administration are directed to issue. Such appointment may be made by the probate judge upon the written application of any person interested in the trust filed in the probate proceedings, and shall only be made after notice to all parties interested in the trust, given in the same manner as notice is required to be given of the hearing upon the petition for the probate of a will. In each of the preceding cases the court may order such further notice as shall seem necessary. In accepting a declination under the provisions of this section, the court may make and enforce any order which may be necessary for the preservation of the estate. This section shall be applicable to any and all estates now pending in which a final distribution and discharge has not been granted. En. Stats. 1891, 15. Am'd. 1899, 104.

Cal. Rep. Cit. 135, 368.

§ 1703. Jurisdiction. The provisions of the next preceding section shall apply in all cases where a final decree of distribution has not been made; but the jurisdiction given by said section shall not exclude, in cases to which it applies the jurisdiction now possessed by the courts of this state. En. Stats. 1891, 16.

Cal. Rep. Cit. 107, 595; 133, 495.

§ 1703½. Distribution to treasurer. When any estate is distributed by the judgment or decree of the court or a judge thereof, as provided in this chapter, to a distributee who cannot be found and his or her place of residence is unknown, or to a minor or incompetent person, who has no lawful guardian to receive the same, or person authorized to receipt therefor, the portion of said estate consisting of money shall be paid to and deposited with the county treasurer of the county in which the estate is being probated, who shall give a receipt for the same, and shall be liable on his official bond therefor; and said receipt shall be deemed and received by the court or judge thereof as a voucher in favor of said executor or administrator, with the same force and effect as if executed by the

distributee thereof. And this section shall be applicable to any and all estates now pending in which a final decree of discharge has not been granted. Said moneys so paid into the county treasury, shall be paid out upon petition to, and the order of the superior court or judge thereof to the person entitled to receive the same. En. Stats. 1897, 38. Am'd. 1905, 6.

The act adding this article to the code contained a provision that it should "apply to all estates of decedents, where a final decree of distribution has not heretofore been made." En. Stats. 1889, 338.

CHAPTER XII.

OF ORDERS, DECREES, PROCESS, MINUTES, RECORDS, TRIALS, AND APPEALS.

- § 1704. Orders and decrees to be entered in minutes.
- § 1705. How often publication to be made.
- § 1706. Recorded decree or order to impart notice from date of filing.
- § 1707. Citation, how directed and what to contain.
- § 1708. Citation, how issued.
- § 1709. Citation, how served.
- § 1710. Personal notice given by citation.
- § 1711. Citation to be served five days before return.
- § 1712. One description of real estate sought to be sold being published, is sufficient for all purposes.
- § 1713. Rules of practice generally.
- § 1714. New trials and appeals.
- § 1715. Within what time appeal must be taken.
- § 1716. Issues joined in probate court, how tried and disposed of.
- § 1717. Court to try case when no jury is demanded. How and what issues to be tried.
- § 1718. Court to appoint attorney for minor or absent heirs, devisees, legatees, or creditors, when, and what compensation he is to receive. (Repealed.)
- § 1719. Decrees, what to be recorded.
- § 1720. Costs, by whom paid in certain cases.
- § 1721. Executor, etc., to be removed when committed for contempt.
- § 1722. Service upon guardian.
- § 1723. Disposition of life estates or homesteads or community property in certain cases.

§ 1704. Orders and decrees to be entered in minutes. Orders and decrees made by the court, or a judge thereof, in probate proceedings, need not recite the existence of facts, or the performance of acts, upon which the jurisdiction of the court or judge may depend, but it shall only

be necessary that they contain the matters ordered or adjudged, except as otherwise provided in this title. All orders and decrees of the court or judge must be entered at length in the minute-book of the court. En. March 11, 1872. Am'd. 1873-4, 374; 1880, 105.

Cal. Rep. Cit. 72, 578; 99, 515; 110, 227; 119, 28; 122, 529; 139, 696; 143, 411.

Prob. Act, sec. 287. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 652.

Cal. Rep. Cit. 51, 150.

§ 1705. How often publication to be made. When any publication is ordered, such publication must be made daily, or otherwise as often during the prescribed period as the paper is regularly issued, unless otherwise provided in this title. The court, or a judge thereof, may, however, order a less number of publications during the period. En. March 11, 1872. Am'd. 1880, 105.

Cal. Rep. Cit. 73, 559; 84, 446; 84, 447; 120, 431; 121, 524.

Affidavit of publication: Post, secs. 2010, 2011.

§ 1706. Recorded decree or order to impart notice from date of filing. When it is provided in this title that any order or decree of the court, or a judge thereof, or a copy thereof must be recorded in the office of the county recorder, from the time of filing the same for record, notice is imparted to all persons of the contents thereof. En. March 11, 1872. Am'd. 1880, 105.

§ 1707. Citation, how directed and what to contain. Citations must be directed to the person to be cited, signed by the clerk and issued under the seal of the court, and must contain:

1. The title of the proceeding;
2. A brief statement of the nature of the proceeding;
3. A direction that the person cited appear at a time and place specified. En. March 11, 1872.

Cal. Rep. Cit. 68, 86; 72, 24; 116, 451.

§ 1708. Citation, how issued. The citation may be issued by the clerk upon the application of any party without an order of the judge, except in cases in which such order is by the provisions of this title expressly required. En. March 11, 1872.

Cal. Rep. Cit. 68, 86; 72, 24; 116, 451.

§ 1709. **Citation, how served.** The citation must be served in the same manner as a summons in a civil action. En. March 11, 1872.

Cal. Rep. Cit. 67, 19; 68, 86; 68, 87; 72, 24; 109, 254; 116, 451; 143, 21.

Prob. Act, sec. 289. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 653.

Cal. Rep. Cit. 68, 89.

Service of citation—time for: Post, sec. 1711; of summons: Ante, sec. 410.

§ 1710. **Personal notice given by citation.** When personal notice is required, and no mode of giving it is prescribed in this title, it must be given by citation. En. March 11, 1872.

Cal. Rep. Cit. 67, 19; 68, 86; 68, 87.

Prob. Act, sec. 288. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 652.

Cal. Rep. Cit. 68, 89.

§ 1711. **Citation to be served five days before return.** When no other time is specially prescribed in this title, citations must be served at least five days before the return day thereof. En. March 11, 1872.

Cal. Rep. Cit. 116, 451.

Prob. Act, sec. 290. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 653.

§ 1712. **One description of real estate sought to be sold being published, is sufficient for all purposes.** When a complete description of the real property of an estate sought to be sold has been given and published in a newspaper, as required in the order to show cause why the sale should not be made, such description need not be published in any subsequent notice of sale or notice of a petition for the confirmation thereof. It is sufficient to refer to the description contained in the publication of the first notice, as being proved and on file in the court. En. March 11, 1872.

Cal. Rep. Cit. 139, 20.

§ 1713. **Rules of practice generally.** Except as otherwise provided in this title, the provisions of part two of this code are applicable to and constitute the rules of prac-

tice in the proceedings mentioned in this title. En. March 11, 1872.

Cal. Rep. Cit. 55, 576; 56, 325; 61, 163; 63, 37; 74, 205; 80, 145; 93, 623; 108, 94; 116, 450; 133, 585; 139, 591; 145, 467.

Prob. Act, sec. 293. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1861, 653.

Cal. Rep. Cit. 46, 247.

Part two: Ante, secs. 307 et seq.

§ 1714. New trials and appeals. The provisions of part two of this code, relative to new trials and appeals—except in so far as they are inconsistent with the provisions of this title—apply to the proceedings mentioned in this title. En. March 11, 1872.

Cal. Rep. Cit. 53, 631; 55, 576; 68, 132; 74, 205; 83, 619; 88, 315; 93, 618; 133, 585.

New trials: Ante, secs. 656 et seq.; appeals, Ante, secs. 936 et seq.

§ 1715. Within what time appeal must be taken. The appeal must be taken within sixty days after the order, decree, or judgment is entered. En. March 11, 1872.

Cal. Rep. Cit. 54, 228; 55, 576; 64, 379; 64, 428; 68, 132; 74, 205; 75, 524; 83, 619; 93, 621; 95, 672; 96, 114; 98, 553; 109, 646; 119, 28; 122, 529; 133, 322; 133, 323; 134, 122; 138, 197; 141, 73; 147, 194.

Appeals from superior courts—in probate matters: Sec. 963, subd. 3.

§ 1716. Issues joined in probate court, how tried and disposed of. All issues of fact joined in probate proceedings must be tried in conformity with the requirements of article two, chapter two, of this title, and in all such proceedings the party affirming is plaintiff, and the one denying or avoiding is defendant. Judgments therein, on the issue joined, as well as for costs, may be entered and enforced by execution or otherwise by the court, as in civil actions. En. March 11, 1872. Am'd. 1880, 106.

Cal. Rep. Cit. 55, 576; 56, 325; 68, 132; 72, 339; 74, 205; 74, 207; 116, 643; 133, 585; 140, 439; 147, 128.

Prob. Act, sec. 294. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1855, 300; 1861, 653; 1868, 629.

Cal. Rep. Cit. 35, 510; 35, 511.

Trial of issues: Post, sec. 1717.

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§ 1717. Court to try case when no jury is demanded. How and what issues to be tried. If no jury is demanded, the court must try the issues joined. If on written demand a jury is called by either party, and the issues are not sufficiently made up by the written pleadings on file, the court, on due notice to the opposite party, must settle and frame the issues to be tried, and submit the same, together with the evidence of each party, to the jury, on which they must render a verdict. Either may move for a new trial, upon the same grounds and errors, and in like manner, as provided in this code for civil actions. En. March 11, 1872.

Cal. Rep. Cit. 68, 132; 72, 339; 74, 207; 96, 114; 133, 585.

New trials: Ante, sec. 1714.

§ 1718. Court to appoint attorney for minor or absent heirs, devisees, legatees, or creditors, when, and what compensation he is to receive. En. March 11, 1872. Am'd. 1873-4, 374; 1880, 106. Rep. 1903, 243.

Cal. Rep. Cit. 75, 599; 93, 629; 125, 258; 134, 6.

§ 1719. Decrees, what to be recorded. When a judgment or decree is made, setting apart a homestead, confirming a sale, making distribution of real property, or determining any other matter affecting the title to real property, a certified copy of the same must be recorded in the office of the recorder of the county in which the property is situated. En. March 11, 1872. Am'd. 1873-4, 375.

Prob. Act, sec. 296. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1855, 301; 1861, 654.

§ 1720. Costs, by whom paid in certain cases. When it is not otherwise prescribed in this title, the superior court, or the supreme court on appeal, may, in its discretion, order costs to be paid by any party to the proceedings, or out of the assets of the estate, as justice may require. Execution for the costs may issue out of the superior court. En. March 11, 1872. Am'd. 1880, 106.

Cal. Rep. Cit. 47, 452; 93, 571; 112, 453; 120, 452; 120, 453; 120, 454; 141, 426.

Prob. Act, sec. 302. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448. Am'd. 1855, 302.

Cal. Rep. Cit. 36, 280.

Costs against executor—or administrator: Ante, seq. 1509.

§ 1721. **Executor, etc., to be removed when committed for contempt.** Whenever an executor, administrator, or guardian is committed for contempt in disobeying any lawful order of the court, or a judge thereof, and has remained in custody for thirty days without obeying such order, or purging himself otherwise of the contempt, the court may, by order reciting the facts, and without further showing or notice, revoke his letters and appoint some other person entitled thereto executor, administrator, or guardian in his stead. En. March 11, 1872. Am'd. 1880, 106.

§ 1722. **Service upon guardian.** Whenever an infant, insane, or incompetent person has a guardian of his estate residing in this state, personal service upon the guardian of any process, notice, or order of the court concerning the estate of a deceased person in which the ward is interested, is equivalent to service upon the ward, and it is the duty of the guardian to attend to the interests of the ward in the matter. Such guardian may also appear for his ward and waive any process, notice, or order to show cause which an adult or a person of sound mind might do. En. Stats. 1873-4, 375. Am'd. 1880, 107.

§ 1723. **Disposition of life estates or homesteads, or community property, on owner's death in certain cases.** If any person has died or shall hereafter die who at the time of his death was the owner of a life estate which terminates by reason of the death of such person, or if such person at the time of his death was one of the spouses owning lands as a homestead, which lands by reason of the death of such person, vest in the surviving spouse; or if such person was a married woman who at the time of her death was the owner of community property which passed upon her death to the surviving husband; any person interested in the property, or in the title thereto, in which such estates or interests were held, may file in the superior court of the county in which the property is situated, his verified petition setting forth such facts, and thereupon and after such notice by publication or otherwise, as the court may order, the court shall hear such petition and the evidence offered in support thereof, and if upon such hear-

ing it shall appear that such life estate of such deceased person absolutely terminated by reason of his death, or such homestead or community property vested in the survivor of such marriage, the court shall make a decree to that effect, and thereupon a certified copy of such decree may be recorded in the office of the county recorder, and thereafter shall have the same effect as a final decree of distribution so recorded. En. Stats. 1881, 35. Am'd. 1897, 62; 1905, 146.

Cal. Rep. Cit. 102, 538; 102, 541; 131, 450; 136, 387; 142, 120.

CHAPTER XIII.

OF PUBLIC ADMINISTRATOR.

- § 1726. What estates to be administered by public administrator.
- § 1727. Public administrator to obtain letters, when and how. His bond and oath.
- § 1728. Duty of persons in whose house any stranger dies.
- § 1729. Must return inventory and administer estates according to this title.
- § 1730. When another person is appointed administrator or executor, public administrator to deliver up the estate.
- § 1731. Civil officers to give notice of waste to public administrator.
- § 1732. Suits for property of decedents.
- § 1733. Order to examine party charged with embezzling estate.
- § 1734. Punishment for refusing to attend.
- § 1735. Order on public administrator to account.
- § 1736. Every six months to make and publish return of condition of estate.
- § 1737. Moneys paid to county treasurer. Investments. Escheat.
- § 1738. Not to be interested in the payments for or on account of estates in his hands.
- § 1739. When to settle with county clerk, and how unclaimed estate disposed of.
- § 1740. Proceedings against public administrator for failure to pay over money as ordered.
- § 1741. Fees of officers, when and by whom paid.
- § 1742. Public administrator to administer oaths.
- § 1743. Preceding chapters applicable to public administrator.
- § 1744. To file reports. Penalty for failure. Duty of district attorney.

§ 1726. What estates to be administered by public administrator. Every public administrator, duly elected, commissioned, and qualified, must take charge of the estates of persons dying within his county as follows:

1. Of the estate of decedents for which no administrators are appointed, and which, in consequence thereof, are being wasted, uncared for, or lost;

2. Of the estate of decedents who have no known heirs;
3. Of the estates ordered into his hands by the court; and
4. Of the estates upon which letters of administration have been issued to him by the court. En. March 11, 1872. Am'd. 1880, 107.

Cal. Rep. Cit. 76, 297; 76, 298; 101, 613; 127, 661; 127, 662; 143, 202; 146, 592; 146, 593; 146, 594; 146, 597.

Public administrator.—By act approved March 30, 1872, Stats. 1871-2, which took effect immediately, if the public administrator of any county of this state fails to qualify, or in person fails to perform the duties of his office, the coroner of such county shall be ex-officio public administrator; and in case both public administrator and coroner fail to qualify, or perform the duties appertaining thereto, the supervisors shall appoint a suitable person to be public administrator; and all laws applicable to the qualification, powers, duties, and compensation of public administrator shall apply to the coroner or appointee of the supervisors as aforesaid. This act was repealed by the County Government Act, 1897, 490, secs. 142-147, prescribing the duties of coroner.

Fees: Ante, sec. 1618.

§ 1727. Public administrator to obtain letters, when and how. His bond and oath. Whenever a public administrator takes charge of an estate, which he is entitled to administer without letters of administration being issued, or under order of the court, he must, with all convenient dispatch, procure letters of administration thereon, in like manner and on like proceedings as letters of administration are issued to other persons. His official bond and oath are in lieu of the administrator's bond and oath; but when real estate is ordered to be sold, another bond may be required by the court. En. March 11, 1872.

Cal. Rep. Cit. 127, 661; 127, 662; 146, 593; 146, 725.

Delivering estate to another appointed: Post, secs. 1730, 1735.

Bond on sale of real estate: Ante, sec. 1389.

§ 1728. Duty of persons in whose house any stranger dies. Whenever a stranger, or person without known heirs, dies intestate in the house or premises of another, the

possessor of such premises, or any one knowing the facts, must give immediate notice thereof to the public administrator of the county; and in default of so doing, he is liable for any damage that may be sustained thereby, to be recovered by the public administrator, or any party interested. En. March 11, 1872.

Cal. Rep. Cit. 143, 202.

Prob. Act, sec. 304. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 7, 231.

§ 1729. Must return inventory and administer estates according to this title. The public administrator must make and return a perfect inventory of all estates taken into his possession, administer and account for the same according to the provisions of this title, subject to the control and directions of the court. En. March 11, 1872, Am'd. 1880, 107.

Cal. Rep. Cit. 143, 202.

Prob. Act, sec. 305. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 7, 231.

§ 1730. When another person is appointed administrator or executor, public administrator to deliver up the estate. If, at any time, letters testamentary or of administration are regularly granted to any other person on an estate of which the public administrator has charge, he must, under the order of the court, account for, pay, and deliver to the executor or administrator thus appointed, all the money, property, papers, and estate of every kind in his possession or under his control. En. March 11, 1872. Am'd. 1880, 107.

Cal. Rep. Cit. 101, 613.

Prob. Act, sec. 306. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Cal. Rep. Cit. 7, 232.

§ 1731. Civil officers to give notice of waste to public administrator. All civil officers must inform the public administrator of all property known to them, belonging to a decedent, which is liable to loss, injury, or waste, and which, by reason thereof, ought to be in the possession of the public administrator. En. March 11, 1872.

Prob. Act, sec. 307. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

§ 1732. Suits for property of decedents. The public administrator must institute all suits and prosecutions necessary to recover the property, debts, papers, or other estate of the decedent. En. March 11, 1872.

Prob. Act, sec. 308. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

§ 1733. Order to examine party charged with embezzling estate. When the public administrator complains to the superior court, or a judge thereof, on oath, that any person has concealed, embezzled, or disposed of, or has in his possession any money, goods, property, or effects, to the possession of which such administrator is entitled in his official capacity, the court or judge may cite such person to appear before the court, and may examine him, on oath, touching the matter of such complaint. En. March 11, 1872, Am'd. 1880, 107. §1733 Repl'd. p. 506

Prob. Act, sec. 309. En. April 22, 1850. Rep. 1851, 489. En. 1851, 448.

Citation: Ante, secs. 1707-1711.

§ 1734. Punishment for refusing to attend. All such interrogatories and answers must be reduced to writing and signed by the party examined, and filed in the court. If the person so cited refuses to appear and submit to such examination, or to answer such interrogatories as may be put to him touching the matter of such complaint, the court may commit him to the county jail, there to remain, in close custody, until he submits to the order of the court. En. March 11, 1872. Am'd. 1880, 107. §1734 Repl'd. p. 506

Prob. Act, sec. 310. En. April 22, 1850. Rep. 1851, 489. En. 1851, 449.

Contempt: Ante, secs. 1209 et seq.

§ 1735. Order on public administrator to account. The court may, at any time, order the public administrator to account for and deliver all the money and property of an estate in his hands to the heirs, or to the executors or administrators regularly appointed. En. March 11, 1872. Am'd. 1880, 108.

Cal. Rep. Cit. 146, 597.

Prob. Act, sec. 311. En. April 22, 1850. Rep. 1850, 489.
En. 1851, 448.

Cal. Rep. Cit. 7, 232.

§ 1736. Every six months to make and publish return of condition of estate. The public administrator, or any person who received letters of administration while acting as public administrator, must, once in every six months, make to the superior court, under oath, a return of all the estates of decedents which have come into his hands, the value of each estate, the money which has come into his hands from every such estate, and what he has done with it, and the amount of his fees, and expenses incurred in each estate, and the balance, if any, in each such case remaining in his hands; publish the same six times in some newspaper published in the county, or if there is none, then post the same, legibly written or printed, in the office of the county clerk of the county. One copy of the return must be filed with papers in each estate so reported. En. March 11, 1872. Am'd. 1880, 108; 1895, 157.

Cal. Rep. Cit. 127, 185; 127, 188; 146, 594.

Prob. Act, sec. 312. En. April 22, 1850. Rep. 1851, 489.
En. 1851, 448.

Cal. Rep. Cit. 7, 232.

§1737. Moneys paid to county treasurer. Investments. Escheat. It is the duty of every public administrator, as soon as he shall receive the same, to deposit with the county treasurer of the county in which the probate proceedings are pending, all moneys of the estate not required for the current expenses of the administration; and such moneys may be drawn upon the order of the executor or administrator, countersigned by a superior judge, when required for the purposes of administration. It shall be the duty of the county treasurer to receive and safely keep all such moneys, and pay them out upon the order of the executor or administrator, when countersigned by a superior judge, and not otherwise, and to keep an account with such estate of all moneys received and paid to him; and the county treasurer shall be allowed one per cent upon all moneys received and kept by him, and no greater fees for any services herein provided; and for the safekeeping and payment of all such moneys, as herein provided, the said

treasurer and his sureties shall be responsible upon his official bond, The moneys thus deposited may, upon order of the court, be invested, pending the proceedings, in securities of the United States, or of this state, when such investment is deemed by the court to be for the best interests of the estate. After a final settlement of the affairs of any estate, if there be no heirs, or other claimants thereof, the county treasurer shall pay into the state treasury all moneys and effects in his hands belonging to the estate, upon order of the court; and if any such moneys and effects escheat to the state, they must be disposed of as other escheated estates. En. March 11, 1872. Am'd. 1873-4, 376; 1880, 108.

Cal. Rep. Cit. 143, 196; 143, 202; 143, 204; 143, 205; 143, 206.

Escheated estates: Ante, secs. 1269-1272.

§ 1738. Not to be interested in the payments for or on account of estates in his hands. The public administrator must not be interested in the expenditures of any kind made on account of any estate he administers; nor must he be associated in business or otherwise with any one who is so interested, and he must attach to his report and publication, made in accordance with the preceding section, his affidavit to that effect. En. March 11, 1872.

Cal. Rep. Cit. 55, 142; 103, 586.

§ 1739. When to settle with county clerk, and how unclaimed estate disposed of. Public administrators are required to account, under oath, and to settle and adjust their accounts relating to the care and disbursement of money or property belonging to estates in their hands, with the county clerks of their respective counties, on the first Monday in January and July in each year; one copy of said account to be filed with the papers in each of such estates; and they must pay to the county treasurer any money remaining in their hands of an estate unclaimed, as provided in sections sixteen hundred and ninety-three to sixteen hundred and ninety-six, both inclusive. En. March 11, 1872. Am'd. 1895, 124.

Cal. Rep. Cit. 76, 298; 123, 549; 146, 594.

§ 1740. Proceedings against public administrator for failure to pay over money as ordered. When it appears, from the returns made in pursuance of the foregoing sec-

tions, that any money remains in the hands of the public administrator (after a final settlement of the estate) unclaimed, which should be paid over to the county treasurer, the superior court, or a judge thereof, must order the same to be paid over to the county treasurer; and on failure of the public administrator to comply with the order within ten days after the same is made, the district attorney for the county must immediately institute the requisite legal proceedings against the public administrator for a judgment against him and the sureties on his official bond, in the amount of money so withheld, and costs. En. March 11, 1872. Am'd. 1880, 109.

Cal. Rep. Cit. 146, 594.

§ 1741. **Fees of officers, when and by whom paid.** The fees of all officers chargeable to estates in the hands of public administrators, must be paid out of the assets thereof so soon as the same come into his hands. En. March 11, 1872.

§ 1742. **Public administrator to administer oaths.** Public administrators may administer oaths in regard to all matters touching the discharge of their duties, or the administration of estates in their hands. En. March 11, 1872.

Administration of oaths: Post, secs. 2093 et seq.

Cal. Rep. Cit. 146, 594.

§ 1743. **Preceding chapters applicable to public administrator.** When no direction is given in this chapter for the government or guidance of a public administrator in the discharge of his duties, or for the administration of an estate in his hands, the provisions of the preceding chapters of this title must govern. En. March 11, 1872.

Cal. Rep. Cit. 76, 298; 101, 613; 146, 592.

§ 1744. **To file reports. Penalty for failure. Duty of district attorney.** Every public administrator, or person who holds letters of administration, who was appointed while acting as public administrator, who fails to comply with the provisions of sections seventeen hundred and thirty-five, seventeen hundred and thirty-six, and section seventeen hundred and thirty-nine of this code, is guilty of a misdemeanor; and upon conviction thereof, shall be punished by a fine not less than one hundred dollars for each offense; and it shall be the duty of the district attorney of the county to see that the provisions of this chapter are fully complied with. En. Stats. 1895, 38.

Cal. Rep. Cit. 146, 75.

CHAPTER XIV.

OF GUARDIAN AND WARD.

Article I. Guardians of Minors, §§ 1747-1759.

II. Guardians of Insane and Incompetent Persons, §§ 1763-1767.

III. The Powers and Duties of Guardians, §§ 1768-1776.

IV. The Sale of Property and Disposition of Proceeds, § 1777-1792.

V. Nonresident Guardians and Wards, §§ 1793-1799.

VI. General and Miscellaneous Provisions, §§ 1800-1810.

ARTICLE I.

GUARDIANS OF MINORS.

- § 1747. Superior court to appoint guardians, when and on what petition.
 - § 1748. When minor may nominate guardian; when not.
 - § 1749. When appointment may be made by court, when minor is over fourteen.
 - § 1750. Nomination by minors after arriving at fourteen.
 - § 1751. Who may be guardian. Marriage of guardian.
 - § 1752. Minor having no father or mother.
 - § 1753. Powers and duties of guardian.
 - § 1754. Bond of guardian, conditions of.
 - § 1755. Court may insert conditions in order appointing guardian.
 - § 1756. Letters of guardianship and bond of guardian to be recorded.
 - § 1757. Maintenance of minor out of income of his own property.
 - § 1758. Guardian to give bond. Powers limited.
 - § 1759. Power of courts to appoint guardians and next friend not impaired.
 - § 1760. Transfer of proceedings from one county to another.
- Gen. Cit. to Art.—Cal. Rep. Cit. 111, 271.

§ 1747. Superior court to appoint guardians, when and on what petition. The superior court of each county, when it appears necessary or convenient, may appoint guardians for the persons and estates, or either of them, of minors who have no guardian legally appointed by will or deed, and who are inhabitants or residents of the county, or who reside without the state and have estate within the county. Such appointment may be made on the petition of a relative or other person on behalf of the minor, or on the petition of the minor, if fourteen years of age. Before making such appointment, the court must cause such notice as such court deems reasonable to be given to any person having the care of such minor, and to such relatives of the minor residing in the county as the court may deem proper. In all such proceedings when it appears to the satisfaction of

the court, either from a verified petition, or from affidavits, that the welfare of the minor will be imperiled if such minor is allowed to remain in the custody of the person then having the care of such minor, the court may make an order providing for the temporary custody of such minor until a hearing can be had on such petition; and when it appears to the court that there is reason to believe that such minor will be carried out of the jurisdiction of the court before which the application is made, or will suffer some irreparable injury before compliance with such order providing for the temporary custody of such minor can be enforced, such court may at the time of making such order providing for the temporary custody of such minor cause a warrant to be issued, reciting the facts and directed to the sheriff, coroner, or constable of the county, commanding such officer to take such minor from the custody of the person in whose care such minor then is and place such minor in custody in accordance with the order of the court. En. March 11, 1872. Am'd. 1873-4, 377; 1880, 65; 1903, 204.

Cal. Rep. Cit. 74, 424; 83, 352; 84, 596; 95, 377; 109, 646; 109, 647; 109, 649; 109, 656; 126, 55; 128, 219; 130, 383; 131, 182; 140, 266; 142, 413; 143, 406; 143, 407.

Powers and duties of guardians: Post, secs. 1768 et seq.
Guardian and ward: See Civ. Code, secs. 236-258.

Guardian ad litem: Ante, secs. 372, 373; post, secs. 1722, 1759, 1769.

Minors who are: Civ. Code, secs. 25, 26.

Freeing from parental authority because of abuse: Civ. Code, sec. 203.

Authority of parent ceases when: Civ. Code, sec. 204.

Seal necessary to appointment of guardian: Ante, sec. 153, subd. 2.

§ 1748. When minor may nominate guardian; when not. If the minor is under the age of fourteen years, the court may nominate and appoint his guardian. If he is fourteen years of age, he may nominate his own guardian, who, if approved by the court, must be appointed accordingly. En. March 11, 1872. Am'd. 1880, 65.

Cal. Rep. Cit. 142, 413; 143, 407.

§ 1749. When appointment may be made by court, when minor is over fourteen. If the guardian nominated by the minor is not approved by the court, or if the minor resides

out of the state, or if, after being duly cited by the court, he neglects for ten days to nominate a suitable person, the court or judge may nominate and appoint the guardian in the same manner as if the minor were under the age of fourteen years. En. March 11, 1872. Am'd. 1880, 65.

Cal. Rep. Cit. 72, 24; 142, 413; 143, 407.

§ 1750. Nomination by minors after arriving at fourteen. §175

When a guardian has been appointed by the court for a minor under the age of fourteen years, the minor, at any time after he attains that age, may appoint his own guardian, subject to the approval of the court. En. March 11, 1872. Am'd. 1880, 65. p. 50

Cal. Rep. Cit. 142, 413.

§ 1751. Who may be guardian. Marriage of guardian.

The father or the mother of a minor child under the age of fourteen years, if found by the court competent to discharge the duties of guardianship, is entitled to be appointed a guardian of such minor child, in preference to any other person. The person nominated by a minor of the age of fourteen years as his guardian, whether married or unmarried, may, if found by the court competent to discharge the duties of guardianship, be appointed as such guardian. The authority of a guardian is not extinguished nor affected by the marriage of the guardian. En. March 11, 1872. Am'd. 1891, 136.

Cal. Rep. Cit. 130, 382; 130, 383; 142, 413; 142, 414; 142, 426; 143, 234.

The parent, as such, has no control over the property of the child: Civ. Code, sec. 202.

Bond, testamentary guardian must give: Post, sec. 1758.

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§ 1752. Minor having no father or mother. If the minor has no father or mother living, competent to have the custody and care of his education, the guardian appointed shall have the same. En. March 11, 1872.

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§ 1753. Powers and duties of guardian. Every guardian appointed shall have the custody and care of the education of the minor, and the care and management of his estate, until such minor arrives at the age of majority or marries, or until the guardian is legally discharged. En. March 11, 1872.

Cal. Rep. Cit. 117, 644; 120, 204; 121, 474; 121, 475; 142, 426; 143, 229; 143, 403.

Residence of ward: Civ. Code, sec. 213.

§ 1754. Bond of guardian, conditions of. Before the order appointing any person guardian under this chapter takes effect, and before letters issue, the court must require of such person a bond to the minor with sufficient sureties, to be approved by the judge, and in such sum as he shall order, conditioned that the guardian will faithfully execute the duties of his trust according to law, and the following conditions shall form a part of such bond without being expressed therein:

1. To make an inventory of all the estate, real and personal, of his ward, that comes to his possession or knowledge, and to return the same within such time as the court may order.

2. To dispose of and manage the estate according to law and for the best interest of the ward, and faithfully to discharge his trust in relation thereto, and also in relation to the care, custody, and education of the ward.

3. To render an account on oath of the property, estate, and moneys of the ward in his hands, and all proceeds or interests derived therefrom, and of the management and disposition of the same, within three months after his appointment, and at such other times as the court directs, and at the expiration of his trust to settle his accounts with the court, or with the ward, if he be of full age, or his legal representatives, and to pay over and deliver all the estate, moneys, and effects remaining in his hands, or due from him on such settlement, to the person who is lawfully entitled thereto. Upon filing the bond, duly approved, letters of guardianship must issue to the person appointed. In form the letters of guardianship must be substantially the same as letters of administration, and the oath of the guardian must be indorsed thereon that he will perform the duties of his office as such guardian according to law. En. March 11, 1872. Am'd. 1880, 65.

Cal. Rep. Cit. 53, 17; 65, 229; 84, 596; 84, 597; 117, 644. Subd. 3—121, 472; 121, 474; 143, 236.

Accounts of guardians—rendering: Post, secs. 1773, 1774.
Guardian's bond: Post, sec. 1758; liability on: Ante, sec. 1407.

§ 1755. Court may insert conditions in order appointing guardian. When any person is appointed guardian of a minor, the court may, with the consent of such person, insert in the order of appointment, conditions not otherwise obligatory, providing for the care, treatment, education, and welfare of the minor, and for the care and custody of

his property. The performance of such conditions shall be a part of the duties of the guardian, for the faithful performance of which he and the sureties on his bond shall be responsible. En. March 11, 1872. Am'd. 1880, 66; 1899, 4.

Guardian's bond—liability on: Ante, sec. 1407.

Letters of guardianship—special, issuable at chambers: Ante, sec. 166.

§ 1756. Letters of guardianship and bond of guardian to be recorded. All letters of guardianship issued, and all guardian's bonds executed under the provisions of this chapter, with the affidavits and certificates thereon, must be recorded by the clerk of the court having jurisdiction of the persons and estates of the wards. En. March 11, 1872. Am'd. 1880, 66.

§ 1757. Maintenance of minor out of income of his own property. If any minor having a father living has property, the income of which is sufficient for his maintenance and education in a manner more expensive than his father can reasonably afford, regard being had to the situation of the father's family and to all the circumstances of the case, the expenses of the education and maintenance of such minor may be defrayed out of the income of his own property, in whole or in part, as judged reasonable, and must be directed by the court; and the charges therefor may be allowed accordingly in the settlement of the accounts of his guardian. En. March 11, 1872. Am'd. 1880, 66.

§ 1758. Guardian to give bond. Powers limited. Every testamentary guardian must qualify and has the same powers and must perform the same duties with regard to the person and estate of his ward as guardians appointed by the court, except so far as his powers and duties are legally modified, enlarged, or changed by the will by which such guardian was appointed, and except that such guardian need not give bond unless directed to do so by the court from which the letters of guardianship issue. En. March 11, 1872. Am'd. 1880, 67; 1903, 53.

Cal. Rep. Cit. 55, 85; 84, 596.

Testamentary guardian—bond of: Ante, sec. 1754.

Guardian's bond, liability on: Ante, sec. 1407.

§ 1759. Power of courts to appoint guardians and next friend not impaired. Nothing contained in this chapter affects or impairs the power of any court to appoint a guardian to defend the interests of any minor interested in any suit or matter pending therein. En. March 11, 1872.

Guardian ad litem: Ante, secs. 372, 373, 1722; post, sec. 1769.

§ 1760. Transfer of proceedings from one county to another county. The superior court of any county in this state in which is now pending, or in which there may be hereafter commenced, any proceeding which has for its object the guardianship of the estate of any minor or insane or incompetent person, or the guardianship of the person of any minor or insane or incompetent person, or both the guardianship of the estate and the guardianship of the person of a minor or insane or incompetent person, may make an order transferring such proceeding to the superior court of any other county in this state, in the manner herein provided; except that no such proceeding shall be transferred to the court of any county which at the time of such proceeding would not have jurisdiction to issue original letters in such matter or proceeding.

To obtain an order for such removal, the guardian of the person or estate, or both, of such minor or insane or incompetent person, shall file in the superior court of the county where such proceeding is pending, a verified petition setting forth the following matters:

1. The name of the county to the superior court of which it is sought to remove such proceedings;
2. The name of the county or counties in which the ward resides and that in which the guardian resides;
3. The name of the county or counties in which the property of such ward is situated, and a designation of the character and condition thereof;
4. The reasons for such removal;
5. The names and residences, so far as they are known to said guardian, of any relative of such minor ward residing in said county in which said proceeding is pending;
6. The names and residences, so far as the same are known to said guardian, of the relatives within the third degree of such insane or incompetent ward residing in said county.

Upon filing such petition an order shall be made by the court or judge fixing a time for hearing said petition, which shall be not less than five days thereafter, and di-

recting that a copy of such order be sent through the United States mail to each of the said relatives of such minor or insane or incompetent ward, named in said petition as resident in the county in which said proceeding is pending.

The court may require such other or further notice of said hearing as it may deem proper.

At the time fixed for the hearing of said petition any relatives of such ward, or any person interested in the estate of such ward, may appear and file written grounds of opposition to said petition. If after hearing the evidence of the petitioner, and contestant if any, it shall appear to the court that it is for the best interest and advantage of said ward, or of the estate of said ward that the removal of said proceeding be had to the court designated in said petition, or to the superior court of any other county, it shall enter an order directing the removal thereof to said court and directing the clerk to forward all papers on file therein to the clerk of the court to which said proceeding has been ordered removed, and thereafter the court to which said proceeding has been removed shall have jurisdiction of all proceedings therein as fully as if said proceeding had been originally begun in said court.

The clerk of the court to which said proceeding is removed shall be entitled to receive a fee of six dollars on filing the papers transmitted to him, in addition to the expense of such transmission, payable on receipt of the papers by him. En. Stats. 1905, 171.

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ARTICLE II.

GUARDIANS OF INSANE AND INCOMPETENT PERSONS.

- § 1763. Guardians of insane and other incompetent persons.
- § 1764. Appointment of guardian by court after hearing.
- § 1765. Powers and duties of such guardian.
- § 1766. Proceeding for restoration to capacity.
- § 1767. Definition of incompetent.

§ 1763. Guardians of insane and other incompetent persons. When it is represented to the superior court, or a judge thereof, upon verified petition of any relative or friend, that any person is insane, or from any cause mentally incompetent to manage his property, such court or judge must cause a notice to be given to the supposed insane or incompetent person of the time and place of hearing the case, not less than five days before the time so appointed, and such person, if able to attend, must be produced on the hearing. En. March 11, 1872. Am'd. 1880, 67: §1763 Am'd. p. 507

Cal. Rep. Cit. 57, 531; 87, 195; 120, 142; 120, 696; 120, 697; 127, 338; 134, 632; 140, 337; 143, 465.

Right of person charged with insanity to jury trial: See Pol. Code, sec. 2174.

Guardian ad litem—of insane or incompetent person: Ante, secs. 372, 373, 1722, 1759; post, sec. 1769.

Placing lunatic in asylum: Civ. Code, sec. 258.

Insane person—homestead of: See Stats. 1874, p. 582.

Sale of homestead where husband or wife insane: Civ. Code, sec. 1242.

§ 1764. Appointment of guardian by court after hearing. If, after a full hearing and examination upon such petition, it appear to the court that the person in question is incapable of taking care of himself and managing his property, such court must appoint a guardian of his person and estate, with the powers and duties in this chapter specified. En. March 11, 1872. Am'd. 1880, 67.

Cal. Rep. Cit. 87, 197; 120, 142; 120, 696; 120, 697; 140, 337; 143, 465; 143, 467.

Appointment at chambers: Ante, sec. 166; seal necessary: Sec. 153, subd. 2.

§ 1765. Powers and duties of such guardians. Every guardian appointed, as provided in the preceding section, has the care and custody of the person of his ward, and the management of all his estate until such guardian is legally discharged; and he must give bond to such ward, in like manner and with like conditions as before prescribed with respect to the guardian of a minor. En. March 11, 1872.

Cal. Rep. Cit. 140, 337.

§1766 Bond of guardian: Ante, sec. 1754.

§ 1766. Proceeding for restoration to capacity. Any person who has been declared insane or incompetent, or the guardian, or any relative of such person within the third degree, or any friend, may apply, by petition, to the superior court of the county in which he was declared insane to have the fact of his restoration to capacity judicially determined. The petition shall be verified, and shall state that such person is then sane or competent. Upon receiving the petition, the court must appoint a day for a hearing before the court, and, if the petitioner request it, shall order an investigation before a jury, which shall be summoned and impaneled in the same manner as juries are summoned and impaneled in civil actions. The

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court shall cause notice of the trial to be given to the guardian of the person so declared insane or incompetent, if there be a guardian, and to his or her husband or wife, if there be one, and to his or her father, or mother, if living in the county. On the trial, the guardian or relative of the person so declared insane or incompetent, and, in the discretion of the court, any other person may contest the right to the relief demanded. Witnesses may be required to appear and testify, as in civil cases, and may be called and examined by the court on its own motion. If it be found that the person be of sound mind, and capable of taking care of himself and his property, his restoration to capacity shall be adjudged, and the guardian of such person, if such person be not a minor, shall cease. En. Stats. 1873-4, 377. Am'd. 1880, 67.

Cal. Rep. Cit. 68, 282; 87, 195; 87, 197; 99, 222; 120, 142; 120, 143; 137, 681; 140, 337; 143, 467.

Habeas corpus, right to where one detained as insane: See Pol. Code, sec. 2188.

§ 1767. **Definition of incompetent.** The phrase "incompetent," "mentally incompetent," and "incapable," as used in this chapter, shall be construed to mean any person who, though not insane, is, by reason of old age, disease, weakness of mind, or from any other cause, unable, unassisted, to properly manage and take care of himself or his property, and by reason thereof would be likely to be deceived or imposed upon by artful or designing persons. En. Stats. 1891, 68.

Cal. Rep. Cit. 130, 354; 140, 337; 140, 338.

ARTICLE III.

THE POWERS AND DUTIES OF GUARDIANS.

- § 1768. Guardian to pay debts of ward out of ward's estate.
- § 1769. Guardian to recover debts due his ward and represent him.
- § 1770. Guardian to manage his estate, maintain ward, and sell real estate.
- § 1771. Maintenance, support, and education of ward, how enforced.
- § 1772. Guardians, powers of in petition.
- § 1773. Guardian to return inventory of estate of ward. Appraisers to be appointed. Like proceedings when other property acquired.
- § 1774. Settlements of guardians.
- § 1775. Allowance of accounts of joint guardians.
- § 1776. Expenses and compensation of guardians.

§ 1768. Guardian to pay debts of ward out of ward's estate. Every guardian appointed under the provisions of this chapter, whether for a minor or any other person,

must pay all just debts due from the ward, out of his personal estate, and the income of his real estate, if sufficient; if not, then out of his real estate, upon obtaining an order for the sale thereof, and disposing of the same in the manner provided in this title for the sale of real estate of decedents. En. March 11, 1872.

1768[a] Order of sale of property: Post, secs. 1770, 1777 et seq.

Am'd. § 1769. Guardian to recover debts due his ward and
p. 508 represent him. Every guardian must settle all accounts of the ward, and demand, sue for, and receive all debts due to him, or may, with the approbation of the court, compound for the same and give discharges to the debtor, on receiving a fair and just dividend of his estate and effects; and he must appear for and represent his ward in all legal suits and proceedings, unless another person be appointed for that purpose. En. March 11, 1872. Am'd. 1880, 63.

Cal. Rep. Cit. 117, 644; 134, 248.

Guardian ad litem: Ante, secs. 372, 373, 1722, 1759.

§ 1770. Guardian to manage his estate, maintain ward, and sell real estate. Every guardian must manage the estate of his ward frugally and without waste, and apply the income and profits thereof, as far as may be necessary, for the comfortable and suitable maintenance and support of the ward and his family, if there be any; and if such income and profits be insufficient for that purpose, the guardian may sell or mortgage the real estate, upon obtaining an order of the court therefor, as provided, and must apply the proceeds of such sale or mortgage, as far as may be necessary, for the maintenance and support of the ward and his family, if there be any. En. March 11, 1872. Am'd. 1900-01, 85.

Cal. Rep. Cit. 117, 644; 134, 116.

Sale of property—and disposition of proceeds: Post, secs. 1777 et seq.

§ 1771. Maintenance, support, and education of ward, how enforced. When a guardian has advanced for the necessary maintenance, support, or education of his ward, an amount not disproportionate to the value of his estate or his condition of life, and the same is made to appear to the satisfaction of the court, by proper vouchers and proofs, the guardian must be allowed credit therefor in his settlements. Whenever a guardian fails, neglects, or refuses to furnish suitable and necessary maintenance, support, or education for his ward, the court may order him to do so, and enforce such order by proper process. Whenever any third person, at his request, supplies a ward with

such suitable and necessary maintenance, support, or education, and it is shown to have been done after refusal or neglect of the guardian to supply the same, the court may direct the guardian to pay therefor out of the estate, and enforce such payment by due process. En. March 11, 1872.

§ 1772. Guardians, powers of in partition. The guardian may join in and assent to a partition of the real or personal estate of the ward, wherever such assent may be given by any person; provided, that such assent can only be given after the court having jurisdiction over said estate shall grant an order conferring such authority, which order shall only be made after a hearing in open court upon the petition of the guardian after notice of at least ten days, mailed by the clerk of the court to all the known relatives of the ward residing in the county where the proceedings are pending. The guardian may also consent to a petition of the real or personal estate of his ward without action, and agree upon the share to be set off to such ward, and may execute a release in behalf of his ward to the owners of the shares, of the parts to which they may be respectively entitled, upon obtaining from said court having jurisdiction over said estate, authority to so consent after a hearing in open court upon the petition of the guardian after notice of at least ten days, mailed by the clerk of the court to all the known relatives of the ward residing in the county where the proceedings are pending. En. March 11, 1872. Am'd. 1899, 235.

Assent to partition: Ante, sec. 795.

Appearance by guardian: Ante, secs. 372, 1722.

§ 1773. Guardian to return inventory of estate of ward Appraisers to be appointed. Like proceedings when other property acquired. Every guardian must return to the court an inventory of the estate of his ward within three months after his appointment, and annually thereafter. When the value of the estate exceeds the sum of one hundred thousand dollars, semi-annual returns must be made to the court. The court may, upon application made for that purpose by any person, compel the guardian to render an account to the court of the estate of his ward. The inventories and accounts so to be returned or rendered must be sworn to by the guardian. All the estate of the ward described in the first inventory must be appraised by appraisers appointed, sworn, and acting in the manner provided for regulating the settlement of the estates of decedents. Such inventory, with the appraisement of the property therein described, must be recorded by the

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clerk of the court in a proper book kept in his office for that purpose. Whenever any other property of the estate of any ward is discovered, not included in the inventory of the estate already returned, and whenever any other property has been succeeded to, or acquired by any ward, or for his benefit, the like proceedings must be had for the return and appraisement thereof that are herein provided in relation to the first inventory and return. En. March 11, 1872. Am'd. 1880, 68.

Cal. Rep. Cit. 109, 253; 109, 254.

§1774 Where joint guardians: Post, sec. 1775.

Repl'd. Appraisers—generally: Ante, sec. 1444.

p. 509 Account may be received at chambers: Ante, sec. 166.

§ 1774. **Settlements of guardians.** The guardian must, upon the expiration of a year from the time of his appointment, and as often thereafter as he may be required, present his account to the court for settlement and allowance; provided, that no final account of any insane person who is or has been during his guardianship confined in a state hospital in this state, shall be settled or allowed unless notice of the settlement of said account shall have been first given to the secretary of the state commission in lunacy. En. March 11, 1872. Am'd. 1880, 68; 1905, 228.

§1774[a] Cal. Rep. Cit. 57, 191; 109, 254; 121, 472; 133, 448; 133, 449.

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p. 509 § 1775. **Allowance of accounts of joint guardians.** When an account is rendered by two or more joint guardians, the court may, in its discretion, allow the same upon the oath of any of them. En. March 11, 1872. Am'd 1880, 68.

§1776 guardian must be allowed the amount of his reasonable expenses incurred in the execution of his trust, and he must also have such compensation for his services as the court in which his accounts are settled deems just and reasonable. En. March 11, 1872.

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Cal. Rep. Cit. 73, 641.

Expenses incurred—advances made: Ante, sec. 1771.

ARTICLE IV.

THE SALE OF PROPERTY AND DISPOSITION OF THE PROCEEDS.

§ 1777. May sell property in certain cases.

1778. Sale of real estate to be made upon order of court.

1779. Application of proceeds of sales.

1780. Investment of proceeds of sales

§ 1781. Order for sale, how obtained.

- § 1782. Notice to next of kin, how given.
- § 1783. Copy of order to be served, published, or consent filed.
- § 1784. Hearing of application.
- § 1785. Who may be examined on such hearing.
- § 1786. Costs to be awarded, to whom.
- § 1787. Order of sale, to specify what.
- § 1788. Bond before selling.
- § 1789. All proceedings for sales of property by guardians to conform to chapter seven of this title.
- § 1790. Limit of order of sale.
- § 1791. Conditions of sales of real estate of minor heirs. Bond and mortgage to be given for deferred payments.
- § 1792. Court may order the investment of money of the ward.

§ 1777. May sell property in certain cases. When the income of an estate under guardianship is insufficient to maintain the ward and his family, or to maintain and educate the ward when a minor, his guardian may sell his real or personal estate, or mortgage the real estate for that purpose, upon obtaining an order therefor. En. March 11, 1872. Am'd. 1900-1, 84.

Cal. Rep. Cit. 83, 350; 83, 356; 83, 357; 120, 428; 134, 116.

Power of guardian—to sell property: Ante, sec. 1768.

§ 1778. Sale of real estate to be made upon order of court. When it appears to the satisfaction of the court, upon the petition of the guardian, that for the benefit of his ward his real estate, or some part thereof, should be sold, and the proceeds thereof put out at interest, or invested in some productive stock, or in the improvement or security of any other real estate of the ward, his guardian may sell the same for such purpose, upon obtaining an order therefor. En. March 11, 1872.

Cal. Rep. Cit. 83, 356; 83, 357; 120, 428.

Order for sale of property: Ante, sec. 1768.

§ 1779. Application of proceeds of sales. If the estate is sold for the purposes mentioned in this article, the guardian must apply the proceeds of the sale to such purposes, as far as necessary, and put out the residue, if any, on interest, or invest it in the best manner in his power, until the capital is wanted for the maintenance of the ward and his family, or the education of his children, or for the education of the ward when a minor, in which case the capital may be used for that purpose, as far as may be necessary, in like manner as if it had been personal estate of the ward. En. March 11, 1872.

§ 1780. Investment of proceeds of sales. If the estate is sold for the purpose of putting out or investing the proceeds, the guardian must make the investment according

to his best judgment, or in pursuance of any order that may be made by the court. En. March 11, 1872. Am'd. 1880, 68.

§ 1781. Order for sale, how obtained. To obtain an order for such sale, the guardian must present to the court in which he was appointed guardian a verified petition therefor, setting forth the condition of the estate of his ward, and the facts and circumstances on which the petition is founded, tending to show the necessity or expediency of a sale. En. March 11, 1872. Am'd. 1880, 69.

Cal. Rep. Cit. 83, 346; 83, 350; 83, 355; 83, 356; 83, 357; 120, 424.

§ 1782. Notice to next of kin, how given. If it appear to the court, or a judge thereof, from the petition, that it is necessary or would be beneficial to the ward that the real estate, or some part of it, should be sold, or that the real and personal estate should be sold, the court must thereupon make an order directing the next of kin of the ward, and all persons interested in the estate, to appear before the court, at a time and place therein specified, not less than four nor more than eight weeks from the time of making such order, to show cause why an order should not be granted for the sale of such estate. If it appear that it is necessary or would be beneficial to the ward to sell the personal estate, or some part of it, the court must order the sale to be made. En. March 11, 1872. Am'd. 1880, 69.

Cal. Rep. Cit. 97, 363.

§ 1783. Copy of order to be served, published, or consent filed. A copy of the order must be personally served on the next of kin of the ward, and on all persons interested in the estate, at least fourteen days before the hearing of the petition, or must be published at least once a week for three successive weeks in a newspaper printed in the county, or if there be none printed in the county, then in such newspaper as may be specified by the court in the order. If written consent to making the order of sale is subscribed by all persons interested therein, and the next of kin, notice need not be served or published. En. March 11, 1872. Am'd. 1880, 69.

Cal. Rep. Cit. 97, 363; 120, 425.

Notice: Compare ante, sec. 1539.

§ 1784. Hearing of application. The court, at the time and place appointed in the order, or such other time to

which the hearing is postponed, upon proof of the service or publication of the order, must hear and examine the proofs and allegations of the petitioner, and of the next of kin, and of all other persons interested in the estate who oppose the application. En. March 11, 1872. Am'd. 1880, 69.

Cal. Rep. Cit. 97, 363.

Compare: Ante, sec. 1540.

§ 1785. **Who may be examined on such hearing.** On the hearing, the guardian may be examined on oath, and witnesses may be produced and examined by either party, and process to compel their attendance and testimony may be issued by the court, in the same manner and with like effect as in other cases provided for in this title. En. March 11, 1872. Am'd. 1880, 69.

Compelling attendance and testimony of witnesses: Ante, sec. 1305; post, 1985 et seq.

§ 1786. **Costs to be awarded, to whom.** If any person appears and objects to the granting of any order prayed for under the provisions of this article, and it appears to the court that either the petition or the objection thereto is sustained, the court may, in granting or refusing the order, award costs to the party prevailing, and enforce the payment thereof. En. March 11, 1872.

§ 1737. **Order of sale, to specify what.** If, after a full examination, it appears necessary, or for the benefit of the ward, that his real estate, or some part thereof, should be sold, the court may grant an order therefor, specifying therein the causes or reasons why the sale is necessary or beneficial, and may, if the same has been prayed for in the petition, order such sale to be made either at public or private sale. En. March 11, 1872.

§ 1788. **Bond before selling.** Every guardian authorized to sell real estate must, before the sale, give bond to the ward, with sufficient surety, to be approved by the court, or a judge thereof, with condition to sell the same in the manner, and to account for the proceeds of the sale as provided for in this chapter, and chapter seven of this title. En. March 11, 1872. Am'd. 1880, 69.

Cal. Rep. Cit. 83, 357.

Bond on sale of realty: Ante, sec. 1389.

§ 1789. **All proceedings for sales of property by guardians to conform to chapter seven of this title.** All the

proceedings under petition of guardians for sales of property of their wards, giving notice, and the hearing of such petitions, granting or refusing the order of sale, directing the sale to be made at public or private sale, reselling the same property, return of sale, and application for confirmation thereof, notice and hearing of such application, making orders rejecting or confirming sales and reports of sales, ordering and making conveyances of property sold, accounting and the settlement of accounts, must be had and made as required by the provisions of this title concerning estates of decedents, unless otherwise specially provided in this chapter. En. March 11, 1872.

Cal. Rep. Cit. 52, 637; 55, 142; 83, 355; 109, 254; 115, 205; 120, 425.

Settlement of accounts after letters revoked: Ante, sec. 1629.

§ 1790. **Limit of order of sale.** No order of sale, granted in pursuance of this article, continues in force more than one year after granting the same, without a sale being had. En. March 11, 1872.

§ 1791. **Conditions of sales of real estate of minor heirs. Bond and mortgage to be given for deferred payments.** All sales of real estate of wards must be for cash, or for part cash and part deferred payments, the credit in no case to exceed three years from date of sale, as in the discretion of the court is most beneficial to the ward. Guardians making sales must demand and receive from the purchasers, in case of deferred payments, notes, and a mortgage on the real estate sold, with such additional security as the court deems necessary and sufficient to secure the prompt payment of the amounts so deferred, and the interest thereon. En. March 11, 1872. Am'd. 1880, 70.

Cal. Rep. Cit. 120, 425.

§ 1792. **Court may order the investment of money of the ward.** The court, on the application of a guardian, or any person interested in the estate of any ward, after such notice to persons interested therein as the court shall direct, may authorize and require the guardian to invest the proceeds of sales and any other of his ward's money in his hands, in real estate, or in any other manner most to the interest of all concerned therein, and the court may make such other orders and give such directions as are needful for the management, investment, and disposition

of the estate and effects, as circumstances require. En. March 11, 1872. Am'd. 1880, 70.

Cal. Rep. Cit. 55, 141; 117, 646; 121, 472; 133, 389; 133, 390.

ARTICLE V.

NONRESIDENT GUARDIANS AND WARD.

§ 1793. Guardians of nonresident persons.

§ 1794. Powers and duties of guardians appointed under preceding section.

§ 1795. Such guardians to give bonds.

§ 1796. To what guardianship shall extend.

§ 1797. Removal of nonresident ward's property.

§ 1798. Proceedings on such removal.

§ 1799. Discharge of person in possession.

§ 1793. Guardians of nonresident persons. When a person liable to be put under guardianship, according to the provisions of this chapter, resides without this state and has estate therein, any friend of such person, or any one interested in his estate, in expectancy or otherwise, may apply to the superior court of any county in which there is any estate of such absent person, for the appointment of a guardian, and if, after notice given to all interested, in such manner as such court orders by publication or otherwise, and a full hearing and examination, it appears proper, a guardian for such absent person may be appointed. En. March 11, 1872. Am'd. 1880, 70.

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Cal. Rep. Cit. Subd. 1—67, 93. Subd. 4—67, 93.

Foreign guardian: Sec. 1913.

Guardian, appearance by, etc.: Ante, secs. 372, 373, 1722, 1759, 1769.

Judge may appoint guardians and issue letters of guardianship at chambers: Sec. 166.

§ 1794. Powers and duties of guardians appointed under preceding section. Every guardian, appointed under the preceding section, has the same powers and performs the same duties, with respect to the estate of the ward found within this state, and with respect to the person of the ward, if he shall come to reside therein, as are prescribed with respect to any other guardian appointed under this chapter. En. March 11, 1872.

§ 1795. Such guardians to give bonds. Every guardian must give bond to the ward, in the manner and with the like conditions as hereinbefore provided for other guardians, except that the provisions respecting the inventory, the disposal of the estate and effects, and the account to

be rendered by the guardian, must be confined to such estate and effects as come to his hands in this state. En. March 11, 1872.

Bond, etc.: Ante, sec. 1754.

§ 1796. To what guardianship shall extend. The guardianship which is first lawfully granted to any person residing without this state extends to all the estate of the ward within this state, and excludes the jurisdiction of the court of every other county. En. March 11, 1872. Am'd. 1880, 70.

§ 1797. Removal of nonresident ward's property. When the guardian and ward are both nonresidents, and the ward is entitled to property in this state, which may be removed to another state or foreign country without conflict with any restriction or limitation thereupon, or impairing the right of the ward thereto, such property may be removed to the state or foreign country of the residence of the ward, upon the application of the guardian to the superior court of the county in which the estate of the ward, or the principal part thereof, is situated. En. March 11, 1872. Am'd. 1880, 70.

§ 1798. Proceedings on such removal. The application must be made upon ten days' notice to the resident executor, administrator, or guardian, if there be such, and upon such application the nonresident guardian must produce and file a certificate, under the hand of the clerk and seal of the court, from which his appointment was derived, showing:

1. A transcript of the record of his appointment.
2. That he has entered upon the discharge of his duties.
3. That he is entitled, by the laws of the state of his appointment, to the possession of the estate of the ward; or, must produce and file a certificate, under the hand and seal of the clerk of the court having jurisdiction in the country of his residence, of the estates of persons under guardianship, or of the highest court of such country, attested by a minister, consul, or vice-consul of the United States, resident in such country, that, by the laws of such country, the applicant is entitled to the custody of the estate of his ward, without the appointment of any court. Upon such application, unless good cause to the contrary is shown, the court must make an order granting to such guardian leave to take and remove the property of his ward to the state or place of his residence, which is author-

ity to him to sue for and receive the same in his own name, for the use and benefit of his ward. En. March 11, 1872. Am'd. 1873-4, 378; 1880, 71.

§ 1799. Discharge of person in possession. Such order is a discharge of the executor, administrator, local guardian, or other person in whose possession the property may be at the time the order is made, on filing with the clerk of the court a receipt therefor of a foreign guardian of such absent ward, and transmitting a duplicate receipt, or a certified copy of such receipt, to the court from which such nonresident guardian received his appointment. En. March 11, 1872. Am'd. 1880, 71; 1895, 28.

ARTICLE VI.

GENERAL AND MISCELLANEOUS PROVISIONS.

- § 1800. Examination of persons suspected of defrauding wards or concealing property.
- § 1801. Removal and resignation of guardian, and surrender of estate.
- § 1802. Guardianship, how terminated.
- § 1803. New bond, when required.
- § 1804. Guardian's bond to be filed. Action on.
- § 1805. Limitation of actions on guardian's bond.
- § 1806. Limitation of actions for the recovery of property sold.
- § 1807. More than one guardian of a person may be appointed.
- § 1808. Order appointing guardian, how entered.
- § 1809. Provisions of section ten hundred and fifty-seven apply to guardians.
- § 1810. Guardian decreed to make conveyance for incompetent.

§ 1800. Examination of persons suspected of defrauding wards or concealing property. Upon complaint made to him by any guardian, ward, creditor, or other person interested in the estate or having a prospective interest therein as heir or otherwise, against anyone suspected of having concealed, embezzled, or conveyed away any of the money, goods, or effects, or an instrument in writing belonging to the ward or to his estate, the superior court, or a judge thereof, may cite such suspected person to appear before such court, and may examine and proceed with him on such charge in the manner provided in this title with respect to persons suspected of and charged with concealing or embezzling the effects of a decedent. En. March 11, 1872. Am'd. 1880, 71.

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Cal. Rep. Cit. 94, 349; 133, 136.

Embezzlement of property of estate: Ante, secs. 1458 et seq.

§ 1801. Removal and resignation of guardian, and surrender of estate. When a guardian, appointed either by the testator or a court, becomes insane or otherwise incapable of discharging his trust or unsuitable therefor, or has wasted or mismanaged the estate, or failed for thirty days to render an account or make a return, the superior court may, upon such notice to the guardian as the court may require, remove him and compel him to surrender the estate of the ward to the person found to be lawfully entitled thereto. Every guardian may resign when it appears proper to allow the same; and upon the resignation or removal of a guardian, as herein provided, the court may appoint another in the place of the guardian who resigned or was removed. En. March 11, 1872. Am'd. 1880, 71.

Cal. Rep. Cit. 66, 241; 66, 242; 74, 425; 128, 219; 143, 229.

§ 1802. Guardianship, how terminated. The marriage of a minor ward terminates the guardianship of the person of such ward, but not the estate; and the guardian of an insane or other person may be discharged by the court, when it appears, on the application of the ward or otherwise, that the guardianship is no longer necessary. En. March 11, 1872. Am'd. 1880, 72.

Cal. Rep. Cit. 143, 229.

§ 1803. New bond, when required. The court may require a new bond to be given by a guardian whenever such court deems it necessary, and may discharge the existing sureties from further liability, after due notice given as such court may direct, when it shall appear that no injury can result therefrom to those interested in the estate. En. March 11, 1872. Am'd. 1880, 72.

§ 1804. Guardian's bond to be filed. Action on. Every bond given by a guardian must be filed and preserved in the office of the clerk of the superior court of the county, and in case of a breach of a condition thereof, may be prosecuted for the use and benefit of the ward, or of any person interested in the estate. En. March 11, 1872. Am'd. 1880, 72.

Suit on bond, party beneficially interested: Ante, sec. 367.

§ 1805. Limitation of actions on guardian's bond. No action can be maintained against the sureties on any bond given by a guardian, unless it be commenced within three

years from the discharge or removal of the guardian; but if, at the time of such discharge, the person entitled to bring such action is under any legal disability to sue, the action may be commenced at any time within three years after such disability is removed. En. March 11, 1872.

Cal. Rep. Cit. 121, 474; 143, 222; 143, 223; 143, 228; 143, 229; 143, 230; 143, 233; 147, 616.

§ 1806. Limitation of actions for the recovery of property sold. No action for the recovery of any estate sold by a guardian can be maintained by the ward, or by any person claiming under him, unless it is commenced within three years next after the termination of the guardianship, or, when a legal disability to sue exists by reason of minority or otherwise, at the time when the cause of action accrues, within three years next after the removal thereof. En. March 11, 1872.

Cal. Rep. Cit. 66, 111; 70, 373; 93, 107; 118, 392.

§ 1807. More than one guardian of a person may be appointed. The court, in its discretion, whenever necessary, may appoint more than one guardian of any person subject to guardianship, who must give bond and be governed and liable in all respects as a sole guardian. En. March 11, 1872.

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§ 1808. Order appointing guardian, how entered. Any order appointing a guardian, must be entered as and become a decree of the court. The provisions of this title relative to the estates of decedents, so far as they relate to the practice in the superior court, apply to proceedings under this chapter. En. March 11, 1872. Am'd. 1880, 72.

Cal. Rep. Cit. 83, 355; 109, 254; 143, 228; 143, 234.

Chambers, power at: Ante, secs. 166, 176.

§ 1809. Provisions of section ten hundred and fifty-seven apply to guardians. The provisions of section ten hundred and fifty-seven are hereby declared to apply to guardians appointed by the court, and to the bonds taken or to be taken from such guardians, and to the sureties on such bonds. En. March 11, 1872.

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§ 1810. Guardian decreed to make conveyance for incompetent. When a person who is bound by a contract in writing to convey any real estate shall afterwards and before making the conveyance become and be adjudged to be an incompetent person, the court may make a decree authorizing and directing his guardian to convey such real

estate to the person entitled thereto. Such decree may be made under the provisions of sections fifteen hundred and ninety-seven to sixteen hundred and seven, both inclusive, of this code, all of which provisions are hereby incorporated in this section; the word incompetent being substituted for the word deceased or decedent and the word guardian being substituted for the word administrator or executor, respectively, wherever said words occur. En. Stats. 1903, 166.

TITLE XII.

OF SOLE TRADERS.

- § 1811. Who may become sole traders.
- § 1812. Notice, how given and what to contain.
- § 1813. Petition, what to contain when filed.
- § 1814. May have five hundred dollars of community or husband's property.
- § 1815. Who may oppose it, and how.
- § 1816. Trial or hearing.
- § 1817. Decree, what it must be.
- § 1818. Oath, copy of order to be recorded.
- § 1819. Rights and liabilities of sole traders.
- § 1820. Sole trader must maintain her children.
- § 1821. Husband of sole trader not liable for debts.

§ 1811. Who may become sole traders. A married woman may become a sole trader by the judgment of the superior court of the county in which she has resided for six months next preceding the application. En. March 11, 1872. Am'd. 1881, 10.

§ 1812. Notice, how given and what to contain. A person intending to make application to become a sole trader must publish notice of such intention in a newspaper published in the county, or, if none, then in a newspaper published in an adjoining county, once a week for four successive weeks. The notice must specify the day upon which application will be made, the nature and place of the business proposed to be conducted by her, and the name of her husband. En. March 11, 1872. Am'd. 1881, 10.

§ 1813. Petition, what to contain when filed. Ten days prior to the day named in the notice, the applicant must file a verified petition setting forth:

1. That the application is made in good faith, to enable the applicant to support herself, or herself and others dependent upon her, giving their names and relation;
2. The fact of insufficient support from her husband, and the causes thereof, if known;

3. Any other grounds of application which are good causes for a divorce, with the reason why a divorce is not sought; and

4. The nature of the business proposed to be conducted, and the capital to be invested therein, if any, and the sources from which it is derived. En. March 11, 1872.

§ 1814. May have five hundred dollars of community or husband's property. The applicant may invest in the business proposed to be conducted, a sum derived from the community property or of the separate property of the husband, not exceeding five hundred dollars. En. March 11, 1872.

Cal. Rep. Cit. 63, 428.

§ 1815. Who may oppose it, and how. Any creditor of the husband may oppose the application, by filing in the court (prior to the day named in the notice) a written opposition verified, containing either:

1. A specific denial of the truth of any material allegation of the petition; or setting forth,

2. That the application is made for the purpose of defrauding the opponent; or

3. That the application is made to prevent, or will prevent him from collecting his debt. En. March 11, 1872.

§ 1816. Trial or hearing. On the day named in the notice, or on such other day to which the hearing may be postponed by the court, the applicant must make proof of publication of the notice hereinbefore required, and the issues of fact joined, if any, must be tried as in other cases; if no issues are joined, the court must hear the proofs of the applicant and find the facts in accordance therewith. En. March 11, 1872.

§ 1817. Decree, what it must be. If the facts found sustain the petition, the court must render judgment authorizing the applicant to carry on in her own name and on her own account the business specified in the notice and petition. En. March 11, 1872.

§ 1818. Oath, copy of order to be recorded. The sole trader must make and file with the clerk of the court an affidavit, in the following form:

"I, A. B., do, in the presence of Almighty God, solemnly swear that this application was made in good faith, for

the purpose of enabling me to support myself (and any dependent, such as husband, parent, sister, child, or the like, naming them, if any), and not with any view to defraud, delay, or hinder any creditor or creditors of my husband; and that of the moneys so to be used by me in business, not more than five hundred dollars have come either directly or indirectly from my husband. So help me God."

A certified copy of the decree, with this oath indorsed thereon, must be recorded in the office of the recorder of the county where the business is to be carried on, in a book to be kept for such purpose. En. March 11, 1872.

§ 1819. Rights and liabilities of sole traders. When the judgment is made and entered, and a copy thereof, with the affidavit provided for in section one thousand eight hundred and eighteen, duly recorded, the person therein named is entitled to carry on the business specified, in her own name, and the property, revenues, moneys, and credits so by her invested, and the profits thereof, belong exclusively to her, and are not liable for any debts of her husband, and she, thereafter, has all the privileges of, and is liable to all legal processes provided for debtors and creditors, and may sue and be sued alone without being joined with her husband; provided, however, that she shall not be at liberty to carry on said business in any other county than that named in the notice provided for in section one thousand eight hundred and twelve, until she has recorded in such other county a copy of said judgment and affidavit. En. March 11, 1872. Am'd. 1875-6, 105.

Sue and be sued alone: Ante, sec. 370.

Husband and wife parties to actions: Ante, secs. 370, 371.

§ 1820. Sole trader must maintain her children. A married woman who is adjudged a sole trader is responsible and liable for the maintenance of her minor children. En. March 11, 1872.

§ 1821. Husband of sole trader not liable for debts. The husband of a sole trader is not liable for any debts contracted by her in the course of her sole trader's business, unless contracted upon his written consent. En. March, 11, 1872.

TITLE XIII.

OF PROCEEDINGS IN INSOLVENCY.

§ 1822. Statutes in relation to, continued in force.

§ 1822. Statutes in relation to, continued in force. Nothing in this code affects any of the provisions of "an act for the relief of insolvent debtors and protection of creditors," approved May 4, 1852, or of the acts amendatory thereof, approved respectively March 12, 1858, April 27, 1860, and April 27, 1863; but such acts are recognized as continuing in force notwithstanding the provisions of this code. En. March 11, 1872.

§1822
R. & R.
p. 510

§1822a
Enact.
p. 511

§1822b
Enact
p. 511

§1822c
Enact.
p. 512

§1822d
Enact.
p. 512

§1822e
Enact.
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§1822f
Enact.
p. 513

PART IV.

OF EVIDENCE.

- General Definitions and Divisions, §§ 1823-1839.
- Title I. Of General Principles, §§ 1844-1870.
- II. Kinds and Degrees of Evidence, §§ 1875-1978.
- III. Of the Production of Evidence, §§ 1981-2054.
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- VI. Evidence in Particular Cases, and Miscellaneous and General Provisions, §§ 2070-2104.

OF EVIDENCE.

GENERAL DEFINITIONS AND DIVISIONS.

1823. Definition of evidence.
1824. Definition of proof.
1825. Definition of law of evidence
1826. The degree of certainty required to establish facts.
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1835. Satisfactory evidence defined.
1836. Indispensable evidence defined.
1837. Conclusive evidence defined.
1838. Cumulative evidence defined.
1839. Corroborative evidence defined.

§ 1823. Definition of evidence. Judicial evidence is the means, sanctioned by law, of ascertaining in a judicial proceeding the truth respecting a question of fact. En. March 11, 1872.

Evidence, law of: Post, sec. 1825; kinds of: Post, sec. 1827; degrees of: Post, secs. 1828 et seq.; relevancy of: Post, secs. 1863, 1870; production of: Post, sec. 1825, subd 3; value and effect of: Post, sec. 1825, subd. 5.

§ 1824. **Definition of proof.** Proof is the effect of evidence, the establishment of a fact by evidence. En. March 11, 1872.

Proof, degree required: Post, sec. 1826; order of: Ante, sec. 607, post, sec. 2042; extent of: Post, secs. 1867, 1869; limits of: Post, secs. 1868, 1870; burden of: Post, secs. 1869, 1981.

§ 1825. **Definition of law of evidence.** The law of evidence, which is the subject of this part of the code, is a collection of general rules established by law:

1. For declaring what is to be taken as true without proof;

2. For declaring the presumptions of law, both those which are disputable and those which are conclusive; and,

3. For the production of legal evidence;

4. For the exclusion of whatever is not legal;

5. For determining in certain cases, the value and effect of evidence. En. March 11, 1872.

Subd. 2. Presumptions: Post, secs. 1959, 1961-1963, and notes.

Subd. 3. Production of evidence: Post, secs. 1981-2054.

Subd. 4. Exclusion of evidence: Post, secs. 1867, 1868.

Subd. 5. Value and effect of evidence: Post, sec. 2061.

§ 1826. **The degree of certainty required to establish facts.** The law does not require demonstrations; that is, such a degree of proof as, excluding possibility of error, produces absolute certainty; because such proof is rarely possible. Moral certainty only is required, or that degree of proof which produces conviction in an unprejudiced mind. En. March 11, 1872.

Cal. Rep. Cit. 80, 582; 80, 584; 80, 603; 130, 8; 130, 39; 139, 395; 141, 549; 143, 398.

Proof: Ante, sec. 1824.

§ 1827. **Four kinds of evidence specified.** There are four kinds of evidence:

1. The knowledge of the court;

2. The testimony of witnesses;

3. Writings;

4. Other material objects presented to the senses. En. March 11, 1872.

Cal. Rep. Cit. 61, 404; 107, 209.

- Subd. 1. Knowledge of the court: Post, sec. 1875.
- Subd. 2. Witnesses: Post, secs. 1878-1884.
- Subd. 3. Writings: Post, secs. 1887-1951.
- Subd. 4. Other material objects: Post, sec. 1954.

§ 1828. Several degrees of evidence specified. There are several degrees of evidence:

- 1. Primary and secondary.
- 2. Direct and indirect.
- 3. Prima facie, partial, satisfactory, indispensable, and conclusive. En. March 11, 1872. Am'd. 1873-4, 379.

§ 1829. Primary evidence defined. Primary evidence is that kind of evidence which, under every possible circumstance, affords the greatest certainty of the fact in question. Thus, a written instrument is itself the best possible evidence of its existence and contents. En. March 11, 1872. Am'd. 1873-4, 379.

Cal. Rep. Cit. 54, 557.

§ 1830. Secondary evidence defined. Secondary evidence is that which is inferior to primary. Thus, a copy of an instrument, or oral evidence of its contents, is secondary evidence of the instrument and contents. En. March 11, 1872. Am'd. 1873-4, 379.

Contents of a writing, evidence of: Post, secs. 1855, 1856.

§ 1831. Direct evidence defined. Direct evidence is that which proves the fact in dispute directly, without an inference or presumption, and which in itself, if true, conclusively establishes that fact. For example: if the fact in dispute be an agreement, the evidence of a witness who was present, and witnessed the making of it, is direct. En. March 11, 1872.

Cal. Rep. Cit. 143, 398.

§ 1832. Indirect evidence defined. Indirect evidence is that which tends to establish the fact in dispute by proving another, and which, though true, does not of itself conclusively establish that fact, but which affords an inference or presumption of its existence. For example: a witness proves an admission of the party to the fact in

dispute. This proves a fact, from which the fact in dispute is inferred. En. March 11, 1872.

Cal. Rep. Cit. 106, 193; 141, 63; 141, 398; 146, 121.

Indirect evidence: Post, secs. 1957-1963.

§ 1833. **Prima facie evidence defined.** Prima facie evidence is that which suffices for the proof of a particular fact, until contradicted and overcome by other evidence. For example: the certificate of a recording officer is prima facie evidence of a record, but it may afterward be rejected upon proof that there is no such record. En. March 11, 1872. Am'd. 1873-4, 379.

Cal. Rep. Cit. 70, 570; 75, 449; 83, 272.

Disputable presumption: Post, sec. 1963.

§ 1834. **Partial evidence defined.** Partial evidence is that which goes to establish a detached fact, in a series tending to the fact in dispute. It may be received, subject to be rejected as incompetent, unless connected with the fact in dispute by proof of other facts. For example: on an issue of title to real property, evidence of the continued possession of a remote occupant is partial, for it is of a detached fact, which may or may not be afterwards connected with the fact in dispute. En. March 11, 1872.

Connected with the fact in dispute: Post, sec. 1868.

§ 1835. **Satisfactory evidence defined.** That evidence is deemed satisfactory which ordinarily produces moral certainty or conviction in an unprejudiced mind. Such evidence alone will justify a verdict. Evidence less than this is denominated slight evidence. En. March 11, 1872.

Cal. Rep. Cit. 72, 527; 76, 108; 79, 406; 80, 132; 80, 584; 94, 350; 94, 412; 105, 522; 132, 366; 132, 620; 133, 166; 136, 414; 139, 395; 140, 399; 141, 549.

Satisfactory evidence, to justify verdict: Post, sec. 2061, subd. 5.

§ 1836. **Indispensable evidence defined.** Indispensable evidence is that without which a particular fact cannot be proved. En. March 11, 1872.

Indispensable evidence: Secs. 1967-1974.

§ 1837. **Conclusive evidence defined.** Conclusive or unanswerable evidence is that which the law does not permit

to be contradicted. For example, the record of a court of competent jurisdiction cannot be contradicted by the parties to it. En. March 11, 1872.

Cal. Rep. Cit. 83, 272.

Conclusive evidence: Post, secs. 1908, 1962, 1978.

§ 1838. **Cumulative evidence defined.** Cumulative evidence is additional evidence of the same character to the same point. En. March 11, 1872.

Cal. Rep. Cit. 92, 208.

§ 1839. **Corroborative evidence defined.** Corroborative evidence is additional evidence of a different character, to the same point. En. March 11, 1872.

Cal. Rep. Cit. 111, 14.

TITLE I.

OF THE GENERAL PRINCIPLES OF EVIDENCE.

- 1844. One witness sufficient to prove a fact.
- 1845. Testimony confined to personal knowledge.
- 1846. Testimony to be in presence of persons affected.
- 1847. Witness presumed to speak the truth.
- 1848. One person not affected by acts of another.
- 1849. Declarations of predecessor in title evidence.
- 1850. Declarations which are a part of the transaction.
- 1851. Evidence relating to third person.
- 1852. Declaration of decedent evidence of pedigree.
- 1853. Declaration of decedent evidence against his successor in interest.
- 1854. When part of a transaction proved, the whole is admissible.
- 1855. Contents of writing, how proved.
- 1856. An agreement reduced to writing deemed the whole.
- 1857. Construction of language relates to place where used.
- 1858. Construction of statutes and instruments, general rule.
- 1859. The intention of the legislature or parties.
- 1860. The circumstances to be considered.
- 1861. Terms to be construed in their general acceptation.
- 1862. Written words control those printed in a blank form.
- 1863. Persons skilled may testify to decipher characters.
- 1864. Of two constructions, which preferred.
- 1865. A written instrument construed as understood by parties.
- 1866. Construction in favor of natural right preferred.
- 1867. Material allegations only to be proved.
- 1868. Evidence confined to material allegations.
- 1869. Affirmative only to be proved.
- 1870. Facts which may be proved on trial.

§ 1844. **One witness sufficient to prove a fact.** The direct evidence of one witness who is entitled to full credit

is sufficient for proof of any fact, except perjury and treason. En. March 11, 1872.

Cal. Rep. Cit. 62, 310; 125, 37.

Witness, definition: Post, sec. 1878; witness, competency: Post, secs. 1879 et seq.; two witnesses for lost or destroyed will: Ante, sec. 1339; perjury and treason, more than one witness: Post, sec. 1968.

§ 1845. **Testimony confined to personal knowledge.** A witness can testify of those facts only which he knows of his own knowledge; that is, which are derived from his own perceptions, except in those few express cases in which his opinions or inferences, or the declarations of others, are admissible. En. March 11, 1872.

Cal. Rep. Cit. 85, 584; 142, 111; 145, 152.

Opinions, inferences, declarations: See sec. 1870.

§ 1846. **Testimony to be in presence of persons affected.** A witness can be heard only upon oath or affirmation, and upon a trial he can be heard only in the presence and subject to the examination of all the parties, if they choose to attend and examine. En. March 11, 1872.

Cal. Rep. Cit. 87, 113.

Oath or affirmation, administration of: Post, secs. 2093-2097.

Examination of witnesses: Post, secs. 2042-2054.

§ 1847. **Witness presumed to speak the truth.** A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty, or integrity, or his motives, or by contradictory evidence; and the jury are the exclusive judges of his credibility. En. March 11, 1872.

Cal. Rep. Cit. 50, 235; 60, 413; 65, 551; 86, 35; 106, 93; 121, 669; 123, 409; 130, 10; 134, 540; 141, 612; 143, 127; 143, 640.

Evidence of good character: Post, sec. 2053.

Impeachment of witness: Post, sec. 2052.

Value of evidence: Post, sec. 2061.

Presumption repelled, manner of testifying: Post, sec. 2061, subd. 2; character of testimony: Post, sec. 2061,

subd. 3; impeaching credit: Post, secs. 2049, 2051, 2052; contradictory evidence: Post, secs. 2049, 2051.

Jury exclusive judges of credibility: Post, sec. 2061.

§ 1848. One person not affected by acts of another. The rights of a party cannot be prejudiced by the declaration, act, or omission of another, except by virtue of a particular relation between them; therefore, proceedings against one cannot affect another. En. March 11, 1872. Am'd. 1873-4, 380.

Cal. Rep. Cit. 146, 529.

Books, entries in: Post, sec. 1946.

Declaration, etc., of another, when admissible: Secs. 1849-1853; declarations of decedents: Post, sec. 1870; partner, agent, etc.: Post, sec. 1870, subd. 5.

§ 1849. Declarations of predecessor in title evidence. Where, however, one derives title to real property from another, the declaration, act, or omission of the latter, while holding the title, in relation to the property, is evidence against the former. En. March 11, 1872.

Cal. Rep. Cit. 50, 479; 52, 349; 60, 503; 60, 510; 60, 511; 63, 16; 70, 313; 70, 315; 70, 318; 79, 413; 93, 96; 106, 384; 109, 670; 120, 126; 121, 52; 121, 594; 145, 774.

§ 1850. Declarations which are a part of the transaction. Where, also, the declaration, act, or omission forms part of a transaction, which is itself the fact in dispute, or evidence of that fact, such declaration, act, or omission is evidence, as part of the transaction. En. March 11, 1872.

Cal. Rep. Cit. 58, 26; 58, 158; 62, 310; 63, 16; 79, 311; 99, 73; 106, 384; 124, 659; 133, 136; 139, 431; 140, 456; 145, 690; 145, 774.

Declarations before others: Sec. 1870, subd. 3; writing, evidence to explain: Sec. 1860.

§ 1851. Evidence relating to third person. And where the question in dispute between the parties is the obligation or duty of a third person, whatever would be the evidence for or against such person is prima facie evidence between the parties. En. March 11, 1872. Am'd. 1873-4, 380.

Cal. Rep. Cit. 76, 5; 145, 774.

§ 1852. Declaration of decedent evidence of pedigree. The declaration, act, or omission of a member of a fam-

C. C. P., 1906, new.

§ 1855a. When it is desired to prove the contents of any public record or document lost or destroyed by conflagration or other public calamity and after proof of such loss or destruction, there is offered in proof of such contents, any abstract of title issued and certified to as correct by any person, firm or corporation engaged in the business of preparing and making abstracts of title issued and certified to as correct by any such person, firm or corporation, the same may be admitted in evidence on proof that the same was prepared and made in the ordinary course of business prior to such loss or destruction, and without further proof by the person who actually made the copies, extracts, notes or memoranda of records, constituting such abstract of title that they were correctly taken from the original record or document; provided, nevertheless, that whenever and as soon as said action is set for trial any party so desiring to use said evidence shall notify all other parties to the action who have appeared therein, of his intention to use the same at the trial of said action, and shall give all such other parties a reasonable opportunity to inspect the same and to take copies thereof. [In effect June 10, 1906.]

ily, who is a decedent, or out of the jurisdiction, is also admissible as evidence of common reputation, in cases where, on questions of pedigree, such reputation is admissible. En. March 11, 1872.

Cal. Rep. Cit. 124, 661; 128, 554; 135, 386; 135, 388; 140, 459; 145, 774.

Declaration of decedent: Post, sec. 1870, subd. 4.

Common reputation on questions of pedigree, etc.: Post, sec. 1870, subd. 11.

§ 1853. Declaration of decedent evidence against his successor in interest. The declaration, act, or omission of a decedent, having sufficient knowledge of the subject, against his pecuniary interest, is also admissible as evidence to that extent against his successor in interest. En. March 11, 1872.

Cal. Rep. Cit. 121, 594; 126, 146; 136, 424; 140, 456; 141, 60; 145, 774.

Decedent's declaration against interest: Post, sec. 1870, subd. 4; entries and other writings: Post, sec. 1946.

§ 1854. When part of a transaction proved, the whole is admissible. When part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing, which is necessary to make it understood, may also be given in evidence. En. March 11, 1872.

Cal. Rep. Cit. 68, 14; 110, 418; 118, 135; 135, 82; 145, 214.

§ 1855. Contents of writing, how proved. There can be no evidence of the contents of a writing, other than the writing itself, except in the following cases:

1. When the original has been lost or destroyed; in which case proof of the loss or destruction must first be made.

2. When the original is in the possession of the party against whom the evidence is offered, and he fails to produce it after reasonable notice.

3. When the original is a record or other document in the custody of a public officer.

4. When the original has been recorded, and a certified copy of the record is made evidence by this code or other statute.

5. When the original consists of numerous accounts or other documents, which cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole.

In the cases mentioned in subdivisions three and four, a copy of the original or of the record must be produced; in those mentioned in subdivisions one and two, either a copy or oral evidence of the contents. En. March 11, 1872. Am'd. 1873-4, 380.

Cal. Rep. Cit. 51, 201; 59, 506; 65, 373; 69, 495; 70, 16; 89, 621; 89, 622; 113, 299; 124, 446. Subd. 4—52, 186; 59, 506. Subd. 5—122, 497; 137, 176; 142, 189.

Prac. Act, sec. 447. En. April 29, 1851.

Contents of writing: Post, secs. 1937, 1969.

Original in possession of opponent, notice to produce: Post, secs. 1938, 1939.

Public writings generally: Post, sec. 1892-1926.

Affidavits: Post, secs. 2009 et seq.

Subd. 4. Certified copies of records: See post, secs. 1919 et seq.

§ 1856. An agreement reduced to writing deemed the whole. When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, except in the following cases:

1. Where a mistake or imperfection of the writing is put in issue by the pleading;

2. Where the validity of the agreement is the fact in dispute.

But this section does not exclude other evidence of the circumstances under which the agreement was made, or to which it relates, as defined in section eighteen hundred and sixty, or to explain an extrinsic ambiguity, or to establish illegality or fraud. The term agreement includes deeds and wills, as well as contracts between parties. En. March 11, 1872.

Cal. Rep. Cit. 48, 99; 89, 621; 95, 570; 97, 387; 104, 109; 104, 111; 104, 118; 104, 121; 112, 51; 117, 211; 121, 520; 124, 446; 129, 375; 135, 29; 144, 691; 146, 694; 147, 318; 147, 325; 147, 327. Subd. 1—137, 75. Subd. 2—137, 100; 141, 228.

Writing supersedes oral negotiations: Civ. Code, sec. 1625; parol evidence to vary or contradict written agreement: Civ. Code, sec. 1639; fraud, to establish: See Civ. Code, sec. 1640; mistake or imperfection, to correct: See Civ. Code, sec. 1640; revision and reformation of contracts for fraud or mistake: Civ. Code, secs. 3399-3402; surrounding circumstances to show: Sec. 1860.

Recitals in document, conclusiveness of: Sec. 1962, subd. 2.

Usage, etc: Sec. 1870, subd. 12.

Consideration: Sec. 1962, subd. 2.

Alterations and erasures: Sec. 1982.

§ 1857. Construction of language relates to place where used. The language of a writing is to be interpreted according to the meaning it bears in the place of its execution, unless the parties have reference to a different place. En. March 11, 1872.

Interpretation of contract, *lex loci*: Civ. Code, sec. 1646.

§ 1858. Construction of statutes and instruments, general rule. In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all. En. March 11, 1872.

Cal. Rep. Cit. 65, 464; 74, 67; 107, 354; 108, 655; 110, 396; 146, 696.

Construction, generally: Post, sec. 1859; giving effect to all: Civ. Code, sec. 1641.

Interpretation which gives effect preferred: Civ. Code, sec. 3541.

§ 1859. The intention of the legislature or parties. In the construction of a statute, the intention of the legislature, and in the construction of the instrument, the in-

tention of the parties, is to be pursued if possible; and when a general and particular provision are inconsistent, the latter is paramount to the former. So a particular intent will control a general one, that is inconsistent with it. En. March 11, 1872.

Cal. Rep. Cit. 68, 489; 74, 67; 135, 180.

Words giving joint authority: Sec. 15, ante. Construction of this code: Secs. 4-18, ante.

Statutes in derogation of common law: Ante, sec. 4.

§ 1860. The circumstances to be considered. For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret. En. March 11, 1872.

Cal. Rep. Cit. 88, 553; 97, 387; 107, 600; 109, 226; 128, 186; 137, 100; 141, 452; 147, 462.

Surrounding circumstances may be shown: Civ. Code, sec. 1647; usage: Post, sec. 1870, subd. 12; descriptive part of conveyance: Post, sec. 2077.

§ 1861. Terms to be construed in their general acceptance. The terms of a writing are presumed to have been used in their primary and general acceptance, but evidence is nevertheless admissible that they have a local, technical, or otherwise peculiar signification, and were so used and understood in the particular instance, in which case the agreement must be construed accordingly. En. March 11, 1872.

Cal. Rep. Cit. 74, 67; 76, 279; 190, 226; 120, 631; 145, 84.

Signification of terms: Compare Civ. Code, secs. 1644, 1645. See, also, sec. 1870, subd. 12, post.

§ 1862. Written words control those printed in a blank form. When an instrument consists partly of written words and partly of a printed form, and the two are inconsistent, the former controls the latter. En. March 11, 1872.

Cal. Rep. Cit. 135, 176; 135, 177.

Compare Civ. Code, sec. 1651.

§ 1863. Persons skilled may testify to decipher characters. When the characters in which an instrument is

written are difficult to be deciphered, or the language of the instrument is not understood by the court, the evidence of persons skilled in deciphering the characters, or who understand the language, is admissible to declare the characters or the meaning of the language. En. March 11, 1872.

Cal. Rep. Cit. 65, 626.

See post, sec. 1870, subds. 9, 10.

§ 1864. Of two constructions, which preferred. When the terms of an agreement have been intended in a different sense by the different parties to it, that sense is to prevail against either party in which he supposed the other understood it, and when different constructions of a provision are otherwise equally proper, that is to be taken which is most favorable to the party in whose favor the provision was made. En. March 11, 1872.

Cal. Rep. Cit. 109, 228; 138, 536.

Compare Civ. Code, secs. 1649, 1654.

§ 1865. A written instrument construed as understood by parties. A written notice, as well as every other writing, is to be construed according to the ordinary acceptation of its terms. Thus, a notice to the drawers or indorsers of a bill of exchange or promissory note, that it has been protested for want of acceptance or payment, must be held to import that the same has been duly presented for acceptance or payment, and the same refused, and that the holder looks for payment to the person to whom the notice is given. En. March 11, 1872.

Ordinary acceptation: Ante, sec. 1861. Compare Civ. Code, sec. 1644; notice of dishonor: Civ. Code, sec. 3143.

§ 1866. Construction in favor of natural right preferred. When a statute or instrument is equally susceptible of two interpretations, one in favor of natural right and the other against it, the former is to be adopted. En. March 11, 1872.

Cal. Rep. Cit. 91, 353; 96, 578.

§ 1867. Material allegations only to be proved. None but a material allegation need be proved. En. March 11, 1872.

Cal. Rep. Cit. 137, 462.

Material allegation, defined: Ante, sec. 463; not controverted: Ante, sec. 462.

Material evidence: Post, sec. 1868.

§ 1868. Evidence confined to material allegations. Evidence must correspond with the substance of the material allegations, and be relevant to the question in dispute. Collateral questions must therefore be avoided. It is, however, within the discretion of the court to permit inquiry into a collateral fact, when such fact is directly connected with the question in dispute, and is essential to its proper determination, or when it affects the credibility of a witness. En. March 11, 1872.

Variance: Ante, secs. 469-471.

Credibility of witness: Ante, sec. 1847; post, sec. 1870, subd. 16.

Material: Ante, sec. 1867.

§ 1869. Affirmative only to be proved. Each party must prove his own affirmative allegations. Evidence need not be given in support of a negative allegation, except when such negative allegation is an essential part of the statement of the right or title on which the cause of action or defense is founded, nor even in such case when the allegation is a denial of the existence of a document, the custody of which belongs to the opposite party. En. March 11, 1872.

Cal. Rep. Cit. 92, 333; 94, 174; 94, 175; 136, 618; 137, 283; 140, 421; 140, 430; 140, 431; 140, 439; 140, 440; 145, 460.

Burden of proof: Post, sec. 1981.

§ 1870. Facts which may be proved on trial. In conformity with the preceding provisions, evidence may be given upon a trial of the following facts:

1. The precise fact in dispute;
2. The act, declaration, or omission of a party, as evidence against such party;
3. An act or declaration of another, in the presence and within the observation of a party, and his conduct in relation thereto;
4. The act or declaration, verbal or written, of a deceased person in respect to the relationship, birth, marriage, or death of any person related by blood or marriage

to such deceased person; the act or declaration of a deceased person done or made against his interest in respect to his real property; and also in criminal actions, the act or declaration of a dying person, made under a sense of impending death, respecting the cause of his death;

5. After proof of a partnership or agency, the act or declaration of a partner or agent of the party, within the scope of the partnership or agency, and during its existence. The same rule applies to the act or declaration of a joint owner, joint debtor, or other person jointly interested with the party;

6. After proof of a conspiracy, the act or declaration of a conspirator against his co-conspirator, and relating to the conspiracy;

7. The act, declaration, or omission forming part of a transaction, as explained in section eighteen hundred and fifty;

8. The testimony of a witness deceased, or out of the jurisdiction, or unable to testify, given in a former action between the same parties, relating to the same matter;

9. The opinion of a witness respecting the identity or handwriting of a person, when he has knowledge of the person or handwriting; his opinion on a question of science, art, or trade, when he is skilled therein;

10. The opinion of a subscribing witness to a writing, the validity of which is in dispute, respecting the mental sanity of the signer; and the opinion of an intimate acquaintance respecting the mental sanity of a person, the reason for the opinion being given;

11. Common reputation existing previous to the controversy, respecting facts of a public or general interest more than thirty years old, and in cases of pedigree and boundary;

12. Usage, to explain the true character of an act, contract, or instrument, where such true character is not otherwise plain; but usage is never admissible, except as an instrument of interpretation;

13. Monuments and inscriptions in public places, as evidence of common reputation; and entries in family bibles, or other family books or charts; engravings on rings, family portraits, and the like, as evidence of pedigree;

14. The contents of a writing, when oral evidence thereof is admissible;

15. Any other facts from which the facts in issue are presumed or are logically inferable;

16. Such facts as serve to show the credibility of a witness, as explained in section eighteen hundred and forty-seven. En. March 11, 1872.

Cal. Rep. Cit. 124, 446; 135, 388; 147, 169. Subd. 1—133, 478. Subd. 2—78, 286; 86, 489; 95, 296; 136, 181; 145, 234. Subd. 3—125, 546; 134, 204; 136, 181. Subd. 4—94, 599; 118, 519; 128, 554; 145, 234. Subd. 5—103, 406; 130, 255; 140, 630. Subd. 6—59, 352; 77, 502; 123, 408. Subd. 7—79, 311. Subd. 8—51, 583; 56, 599; 64, 22; 66, 672; 73, 608; 80, 85; 80, 254; 98, 131; 132, 263. Subd. 9—54, 512; 55, 451; 91, 59; 134, 314; 136, 307. Subd. 10—57, 568; 59, 394; 67, 446; 71, 352; 77, 149; 79, 384; 92, 565; 94, 414; 100, 583; 101, 345; 102, 636; 102, 637; 106, 349; 115, 257; 120, 14; 127, 596; 134, 12; 141, 595; 141, 596; 142, 361; 143, 583. Subd. 11—68, 574; 83, 242; 135, 388; 137, 303. Subd. 12—99, 372; 140, 597; 141, 735. Subd. 13—118, 519. Subd. 14—89, 622; 124, 446. Subd. 15—139, 123; 143, 398. Subd. 16—107, 159.

Offer to compromise: Post, sec. 2078; confession in divorce suit: Post, sec. 2079.

Subd. 7. Res gestae: Ante, sec. 1850.

TITLE II.

OF THE KINDS AND DEGREES OF EVIDENCE.

Chapter I. Knowledge of the Court, § 1875.

II. Witnesses, §§ 1878-1884.

III. Writings, §§ 1887-1951.

IV. Material Objects Presented to the Senses, Other Than Writings, § 1954.

V. Indirect Evidence, Influences and Presumptions, §§ 1957-1963.

VI. Indispensable Evidence, §§ 1967-1974.

VII. Conclusive and Unanswerable Evidence, § 1978.

CHAPTER I.

KNOWLEDGE OF THE COURT.

§ 1875. Certain facts of general notoriety assumed to be true. Specification of such facts.

§ 1875. Certain facts of general notoriety assumed to be true. Specification of such facts. Courts take judicial notice of the following facts:

1. The true signification of all English words and phrases, and of all legal expressions;

2. Whatever is established by law;

3. Public and private official acts of the legislative, executive, and judicial departments of this state and of the United States;

4. The seals of all the courts of this state and of the United States;

5. The accession to office and the official signatures and seals of office of the principal officers of government in the legislative, executive, and judicial departments of this state and of the United States;

6. The existence, title, national flag, and seal of every state or sovereign recognized by the executive power of the United States;

7. The seals of courts of admiralty and maritime jurisdiction, and of notaries public;

8. The laws of nature, the measure of time, and the geographical divisions and political history of the world.

In all these cases the court may resort for its aid to appropriate books or documents of reference. En. March 11, 1872.

Cal. Rep. Cit. 52, 188; 64, 91; 66, 412; 78, 262; 92, 280; 101, 283; 103, 329; 104, 290; 105, 574; 146, 608; 147, 524. Subd. 1—122, 519. Subd. 2—59, 55; 88, 105; 99, 579; 108, 158; 114, 581; 115, 447; 117, 623; 130, 6; 131, 225. Subd. 3—79, 697; 86, 211; 113, 256; 113, 257; 114, 581; 117, 623. Subd. 8—61, 404; 86, 211; 113, 625; 137, 216.

CHAPTER II.

WITNESSES.

§ 1878. Witnesses defined.

§ 1879. All persons capable of perceptions and communication may be witnesses.

§ 1880. Persons who cannot testify.

§ 1881. Persons in certain relations to parties prohibited.

§ 1882. When privileged persons must testify. (Repealed.)

§ 1883. Judge or a juror may be witness.

§ 1884. When an interpreter to be sworn.

§ 1878. Witnesses defined. A witness is a person whose declaration under oath is received as evidence for any purpose, whether such declaration be made on oral examination or by deposition or affidavit. En. March 11, 1872.

Cal. Rep. Cit. 82, 464; 92, 485; 132, 201; 145, 723.

Compare: Post, sec. 2002.

Oral examination: Ante, sec. 1846; general rules of: Post, secs. 2042 et seq.

Deposition: Post, secs. 2019-2038.

Affidavit: Post, secs. 2009-2015.

§ 1879. All persons capable of perceptions and communication may be witnesses. All persons, without exception, otherwise than is specified in the next two sections, who, having organs of sense, can perceive, and perceiving, can make known their perceptions to others, may be witnesses. Therefore, neither parties nor other persons who have an interest in the event of an action or proceeding are excluded; nor those who have been convicted of crime; nor persons on account of their opinions on matters of religious belief; although, in every case, the credibility of the witness may be drawn in question, as provided in section eighteen hundred and forty-seven. En. March 11, 1872.

Cal. Rep. Cit. 47, 126; 60, 413; 64, 270; 64, 271; 70, 54; 71, 378; 71, 550; 72, 458; 82, 464; 104, 486; 106, 92; 122, 658; 135, 172; 137, 302; 139, 472; 141, 570; 141, 572.

Prac. Act, sec. 391. En. April 29, 1851. Am'd. 1863, 701.

Cal. Rep. Cit. 24, 423.

Prac. Act, sec. 392. En. April 29, 1851. Am'd. 1854, 66; 1863, 701.

Cal. Rep. Cit. 4, 16; 6, 195; 6, 358; 9, 70; 14, 471; 17, 604; 26, 35; 26, 148.

Persons incompetent as witnesses: Post, secs. 1880-1881.

§ 1880. Persons who cannot testify. The following persons cannot be witnesses:

1. Those who are of unsound mind at the time of their production for examination.

2. Children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly.

3. Parties or assignors of parties to an action or proceeding or persons in whose behalf an action or proceeding is prosecuted against an executor or administrator, upon a claim or demand against the estate of a deceased person, as to any matter or fact occurring before the death of such deceased person. En. March 11, 1872. Am'd. 1873-4, 381; 1880, 112.

Cal. Rep. Cit. 50, 422; 51, 108; 51, 109; 51, 619; 52, 337, 52, 576; 64, 270; 64, 271; 67, 90; 67, 91; 67, 92; 67, 152; 70, 54; 71, 378; 76, 107; 77, 413; 82, 464; 82, 583; 95, 162; 95, 170; 96, 487; 96, 488; 98, 549; 106, 93; 106, 94; 111, 469; 122, 657; 124, 366; 124, 367; 136, 424; 138, 36; 141, 572; 145, 523; 146, 554. Subd. 2—136, 522; 142, 151; 142, 642. Subd. 3—85, 97; 88, 43; 122, 656; 123, 239; 123, 265; 124, 450; 133, 97; 133, 98; 135, 169; 135, 170; 136, 9; 137, 462; 138, 676; 141, 570; 142, 642; 143, 296; 145, 598.

Prac. Act, sec. 394. En. April 29, 1851. Am'd. 1854, 66; 1863, 60.

Cal. Rep. Cit. 4, 403; 26, 148; 27, 411.

§ 1881
Am'd.
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§ 1881. Persons in certain relations to parties prohibited. There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases:

1. A husband cannot be examined for or against his wife without her consent; nor a wife for or against her husband without his consent; nor can either, during the marriage or afterward, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other.

2. An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment; nor can an attorney's secretary, stenographer, or clerk be examined, without the consent of his employer, concerning any fact the knowledge of which has been acquired in such capacity.

3. A clergyman or priest cannot, without the consent of the person making the confession, be examined as to any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs.

4. A licensed physician or surgeon cannot, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient.

5. A public officer cannot be examined as to communications made to him in official confidence, when the public interests would suffer by the disclosure. En. March 11, 1872. Am'd. 1893, 301.

Cal. Rep. Cit. 53, 427; 54, 516; 64, 257; 64, 258; 64, 271; 70, 54; 79, 677; 82, 464; 83, 140; 92, 485; 94, 226; 97, 46; 100, 587; 101, 516; 111, 299; 115, 526; 116, 300; 147, 234. Subd. 1—117, 639; 120, 481; 122, 658. Subd. 2—106, 347; 110, 254; 113, 472; 136, 96. Subd. 4—93, 71; 97, 45; 100, 394; 100, 400; 106, 91; 106, 93; 109, 669; 109, 670; 110, 256; 116, 166; 166; 644; 117, 639; 119, 445; 126, 6; 132, 187; 132, 396; 136, 260; 140, 338.

Prac. Act, sec. 395. En. April 29, 1851. Am'd. 1863, 771.

Cal. Rep. Cit. 36, 453.

Prac. Act, sec. 396. En. April 29, 1851.

Prac. Act, sec. 397. En. April 29, 1851.

Prac. Act, sec. 398. En. April 29, 1851. Am'd. 1861, 305.

Prac. Act, sec. 399. En. April 29, 1851.

Husband and wife: See Pen. Code, sec. 1322.

§ 1882. When privileged persons must testify. (Repealed.) En. March 11, 1872. Rep. 1875-6, 105.

§ 1883. Judge or a juror may be witness. The judge himself or any juror may be called as a witness by either party; but in such case it is in the discretion of the court or judge to order the trial to be postponed or suspended, and to take place before another judge or jury. En. March 11, 1872.

Cal. Rep. Cit. 64, 460; 102, 9.

Prac. Act, sec. 400. En. April 29, 1851.

Justice as witness, transfer of cause: Ante, sec. 833.

§ 1884. When an interpreter to be sworn. When a witness does not understand and speak the English language, an interpreter must be sworn to interpret for him. Any person, a resident of the proper county, may be summoned by any court or judge to appear before such court or judge to act as interpreter in any action or proceeding. The summons must be served and returned in like manner as a subpoena. Any person so summoned, who fails to at-

tend at the time and place named in the summons, is guilty of a contempt. En. March 11, 1872.

Cal. Rep. Cit. 108, 11; 132, 201.

Prac. Act, sec. 401. En. April 29, 1851. Am'd. 1863, 495.

Subpoena: Post, secs. 1985 et seq.

Contempt: Ante, secs. 1209 et seq.

Acts authorizing appointment of Italian interpreter:
See post, Appendix, title Interpreters.

CHAPTER III.

WRITINGS.

Article I. Writings in General, §§ 1887-1889.

II. Public Writings, §§ 1892-1926.

III. Private Writings, §§ 1929-1951.

ARTICLE I.

WRITINGS IN GENERAL.

§ 1887. Writings, public and private.

§ 1888. Public writings defined.

§ 1889. All others private.

§ 1887. Writings, public and private. Writings are of two kinds:

1. Public; and,

2. Private. En. March 11, 1872.

Cal. Rep. Cit. 111, 149; 119, 171.

§ 1888. Public writings defined. Public writings are:

1. The written acts or records of the acts of the sovereign authority, of official bodies and tribunals, and of public officers, legislative, judicial, and executive, whether of this state, of the United States, of a sister state, or of a foreign country;

2. Public records, kept in this state, of private writings. En. March 11, 1872.

Cal. Rep. Cit. 49, 212; 52, 186; 59, 506; 114, 550.

§ 1889. All others private. All other writings are private. En. March 11, 1872.

Cal. Rep. Cit. 114, 550.

ARTICLE II.

PUBLIC WRITINGS.

- 1892. Every citizen entitled to inspect and copy public writings.
- 1893. Public officers bound to give copies.
- 1894. Four kinds of public writings.
- 1895. Laws, written or unwritten.
- 1896. Written laws defined.
- 1897. Constitution and statutes.
- 1898. Public and private statutes defined.
- 1899. Unwritten law defined.
- 1900. Books containing laws presumed to be correct.
- 1901. Evidence of foreign law.
- 1902. Other evidence of laws of other states.
- 1903. Recitals in statutes, how far evidence.
- 1904. Judicial record defined.
- 1905. Record, how authenticated as evidence.
- 1906. Record of a foreign country, how authenticated.
- 1907. Copy of a foreign record, when evidence.
- 1908. Effect of a judgment upon rights in various cases.
- 1909. Effect of other judicial orders, when conclusive.
- 1910. Where parties are to be deemed the same.
- 1911. What deemed adjudged in a judgment.
- 1912. Where sureties bound, principal is also.
- 1913. Record of another state, its effect.
- 1914. Record of a court of admiralty.
- 1915. Effect of a foreign judgment.
- 1916. Manner of impeaching a record.
- 1917. The jurisdiction necessary in a judgment.
- 1918. Manner of proving other official documents.
- 1919. Public record of private writing evidence.
- 1920. Entries in official books prima facie evidence.
- 1921. Justice's judgment in other states, how proved.
- 1922. Same.
- 1923. Contents of other official certificates.
- 1924. Provisions in relation to states apply to territories.
- 1925. Certificates of purchase primary evidence of ownership.
- 1926. Entries made by officers or boards prima facie evidence.
- 1927. U. S. mineral land patent, date of location prima facie evidence.

§ 1892. Every citizen entitled to inspect and copy public writings. Every citizen has a right to inspect and take a copy of any public writing of this state, except as otherwise expressly provided by statute. En. March 11, 1872.

Cal. Rep. Cit. 114, 550.

Public records, etc., open to inspection: Pol. Code, sec. 1032.

Proceedings in divorce not to be open for inspection: See Pol. Code, sec. 1032.

Fact of issuing attachment not to be made public: See Pol. Code, sec. 1032.

§ 1893. Public officers bound to give copies. Every public officer having the custody of a public writing, which a citizen has a right to inspect, is bound to give him, on demand, a certified copy of it, on payment of the legal fees therefor, and such copy is admissible as evidence in like cases and with like effect as the original writing. En. March 11, 1872. Am'd. 1873-4, 381.

Cal. Rep. Cit. 49, 212; 59, 506; 70, 15; 70, 16.

Public records open to inspection: Pol. Code, sec. 1032.

§ 1894. Four kinds of public writings. Public writings are divided into four classes:

1. Laws;
 2. Judicial records;
 3. Other official documents;
 4. Public records, kept in this state, of private writings.
- En. March 11, 1872.

Cal. Rep. Cit. 49, 212; 50, 348; 59, 506; 70, 15; 70, 16; 114, 550.

§ 1895. Laws, written or unwritten. Laws, whether organic or ordinary, are either written or unwritten. En. March 11, 1872.

§ 1896. Written laws defined. A written law is that which is promulgated in writing, and of which a record is in existence. En. March 11, 1872.

§ 1897. Constitution and statutes. The organic law is the constitution of government, and is altogether written. Other written laws are denominated statutes. The written law of this state is therefore contained in its constitution and statutes, and in the constitution and statutes of the United States. En. March 11, 1872.

Cal. Rep. Cit. 137, 223.

§ 1898. Public and private statutes defined. Statutes are public or private. A private statute is one which concerns only certain designated individuals and affects only their private rights. All other statutes are public, in which are included statutes creating or affecting corporations. En. March 11, 1872.

§ 1899. Unwritten law defined. Unwritten law is the law not promulgated and recorded, as mentioned in sec-

tion eighteen hundred and ninety-six, but which is, nevertheless, observed, and administered in the courts of the country. It has no certain repository, but is collected from the reports of the decisions of the courts and the treatises of learned men. En. March 11, 1872.

Cal. Rep. Cit. 82, 18.

§ 1900. Books containing laws presumed to be correct. Books printed or published under the authority of a sister state or foreign country and purporting to contain the statutes, code, or other written law of such state or country, or proved to be commonly admitted in the tribunals of such state or country, as evidence of the written law thereof, are admissible in this state as evidence of such law. En. March 11, 1872.

Prac. Act, sec. 453. En. April 29, 1851.

Books—historical, etc.: Post, sec. 1936; resort to: Ante, sec. 1875; authority of: Post, sec. 1963, subds. 35, 36.

Sister state—public writings of: Post, sec. 1924.

§ 1901. Evidence of foreign law. A copy of the written law or other public writing of any state or country, attested by the certificate of the officer having charge of the original, under the public seal of the state or country, is admissible as evidence of such law or writing. En. March 11, 1872. Am'd. 1873-4, 381.

Public records of private writings: Post, sec. 1919.

Certificate—requisites of: Post sec. 1923.

Public writing of sister state: Post, sec. 1924.

§ 1902. Other evidence of laws of other states. The oral testimony of witnesses, skilled therein, is admissible as evidence of the unwritten law of a sister state or foreign country, as are also printed and published books of reports of decisions of the courts of such state or country, or proved to be commonly admitted in such courts. En. March 11, 1872.

§ 1903. Recitals in statutes, how far evidence. The recitals in a public statute are conclusive evidence of the facts recited, for the purpose of carrying it into effect, but no further. The recitals in a private statute are con-

clusive evidence between parties who claim under its provisions, but no further. En. March 11, 1872.

Cal. Rep. Cit. 132, 506; 133, 600.

Recitals—In written instrument: Post, sec. 1962, subd. 2.

§ 1904. Judicial record defined. A judicial record is the record or official entry of the proceedings in a court of justice, or of the official act of a judicial officer, in an action or special proceeding. En. March 11, 1872.

Cal. Rep. Cit. 52, 186; 118, 101.

Judgment-roll: Ante, sec. 670.

Execution book as evidence: Ante, sec. 683.

§ 1905. Record, how authenticated as evidence. A judicial record of this state, or of the United States, may be proved by the production of the original or by a copy thereof certified by the clerk or other person having the legal custody thereof. That of a sister state may be proved by the attestation of the clerk, and the seal of the court annexed, if there be a clerk and seal, together with a certificate of the chief judge or presiding magistrate, that the attestation is in due form. En. March 11, 1872.

Cal. Rep. Cit. 81, 152; 104, 414; 113, 256; 113, 257; 118, 101.

Prac. Act, sec. 449. En. April 29, 1851.

Prac. Act, sec. 450. En. April 29, 1851. Am'd. 1854, 67.

Cal. Rep. Cit. 7, 249.

Judicial record, need of seal: Ante, sec. 153, subd. 3; appointment of executor, etc.: Ante, sec. 1429.

Judicial record of a sister state—U. S. Const., art. 4, sec. 1.

Certificate: Post, sec. 1923.

§ 1906. Record of a foreign country, how authenticated. A judicial record of a foreign country may be proved by the attestation of the clerk, with the seal of the court annexed, if there be a clerk and a seal, or of the legal keeper of the record, with the seal of his office annexed, if there be a seal, together with a certificate of the chief judge or presiding magistrate, that the person making the attestation is the clerk of the court, or the legal keeper of the record, and, in either case, that the signature of such person is genuine, and that the attestation

is in due form. The signature of the chief judge or presiding magistrate must be authenticated by the certificate of the magistrate or ambassador, or a consul, vice-consul, or consular agent of the United States in such foreign country. En. March 11, 1872. Am'd. 1873-4, 382.

Cal. Rep. Cit. 86, 101; 104, 412; 104, 413; 104, 414.

Prac. Act, sec. 451. En. April 29, 1851.

Certificate: Post, sec. 1923.

§ 1907. Copy of a foreign record, when evidence. A copy of the judicial record of a foreign country is also admissible in evidence, upon proof:

1. That the copy offered has been compared by the witness with the original, and is an exact transcript of the whole of it;

2. That such original was in the custody of the clerk of the court, or other legal keeper of the same; and,

3. That the copy is duly attested by a seal which is proved to be the seal of the court where the record remains, if it be the record of a court; or if there be no such seal, or if it be not a record of a court, by the signature of the legal keeper of the original. En. March 11, 1872.

Cal. Rep. Cit. 86, 102; 104, 414.

Prac. Act, sec. 452. En. April 29, 1851.

§ 1908. Effect of a judgment upon rights in various cases. The effect of a judgment or final order in an action or special proceeding before a court or judge of this state, or of the United States, having jurisdiction to pronounce the judgment or order, is as follows:

1. In case of a judgment or order against a specific thing, or in respect to the probate of a will, or the administration of the estate of a decedent, or in respect to the personal, political, or legal condition or relation of a particular person, the judgment or order is conclusive upon the title to the thing, the will, or administration, or the condition or relation of the person.

2. In other cases, the judgment or order is, in respect to the matter directly adjudged, conclusive between the parties and their successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing under the same title and in

the same capacity, provided they have notice actual or constructive, of the pendency of the action or proceeding. En. March 11, 1872. Am'd. 1873-4, 382.

Cal. Rep. Cit. 54, 257; 56, 420; 58, 114; 58, 163; 62, 201; 62, 203; 63, 6; 63, 567; 69, 588; 70, 361; 70, 371; 72, 315; 74, 515; 74, 516; 75, 177; 83, 294; 91, 349; 96, 307; 109, 205; 112, 287; 119, 151; 133, 496; 134, 398; 138, 459; 138, 722; 141, 402. Subd. 1—100, 171; 100, 407; 118, 400; 119, 147; 119, 148; 121, 65; 121, 69, 121, 444; 122, 484; 130, 508; 130, 599; 133, 63. Subd. 2—74, 441; 93, 509; 118, 220; 119, 147; 127, 248; 129, 236; 133, 108; 133, 109; 133, 496; 134, 62; 134, 101; 134, 396; 135, 305; 139, 94; 139, 296; 144, 93; 145, 582.

Surety bound by record: Post, sec. 1912.

Jurisdiction, and collateral attacks: Post, sec. 1917.

Validity of judgment founded on service by publication: Ante, sec. 412.

Probate and administration, etc.: Ante, sec. 1333.

Parties, when deemed same: Post, sec. 1910.

Matter directly adjudged: Post, sec. 1911.

Partition, judgment in: Ante, sec. 766.

§ 1909. Effect of other judicial orders, when conclusive.

Other judicial orders of a court or judge of this state, or of the United States, create a disputable presumption, according to the matter directly determined, between the same parties and their representatives and successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing under the same title and in the same capacity. En. March 11, 1872.

Cal. Rep. Cit. 56, 599; 63, 567; 133, 63; 134, 396.

Disputable presumptions: Post, sec. 1963.

Parties and privies: Ante, sec. 1908, subd. 2; post, sec. 1910.

§ 1910. Where parties are to be deemed the same.

The parties are deemed to be the same when those between whom the evidence is offered were on opposite sides in the former case, and a judgment or other determination could in that case have been made between them alone, though other parties were joined with both or either. En. March 11, 1872.

Cal. Rep. Cit. 63, 567; 80, 254; 127, 459.

§ 1911. What deemed adjudged in a judgment. That only is deemed to have been adjudged in a former judg-

ment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto. En. March 11, 1872.

Cal. Rep. Cit. 63, 567; 74, 441; 95, 562; 108, 489; 109, 82; 110, 445; 118, 220; 119, 345; 129, 237; 134, 101; 134, 272; 134, 654; 135, 305; 136, 651; 144, 94; 146, 402.

§ 1912. Where sureties bound, principal is also. Whenever, pursuant to the last four sections, a party is bound by a record, and such party stands in the relation of a surety for another, the latter is also bound from the time that he has notice of the action or proceeding, and an opportunity at the surety's request to join in the defense. En. March 11, 1872.

Cal. Rep. Cit. 63, 567.

§ 1913. Record of another state, its effect. The effect of a judicial record of a sister state is the same in this state as in the state where it was made, except that it can only be enforced here by an action or special proceeding, and except, also, that the authority of a guardian or committee, or of an executor or administrator, does not extend beyond the jurisdiction of the government under which he was invested with his authority. En. March 11, 1872.

Cal. Rep. Cit. 70, 407; 70, 411; 138, 459.

§ 1914. Record of a court of admiralty. The effect of the judicial record of a court of admiralty of a foreign country is the same as if it were the record of a court of admiralty of the United States.* En. March 11, 1872.

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Am'd.
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§ 1915. Effect of a foreign judgment. The effect of the judgment of any other tribunal of a foreign country having jurisdiction to pronounce the judgment, is as follows:

1. In case of a judgment against a specific thing, the judgment is conclusive upon the title to the thing;

2. In case of a judgment against a person, the judgment is presumptive evidence of a right as between the parties and their successors in interest by a subsequent title, and can only be repelled by evidence of a want of jurisdiction, want of notice to the party, collusion, fraud, or clear mistake of law or fact. En. March 11, 1872.

§ 1916. Manner of impeaching a record. Any judicial record may be impeached by evidence of a want of jurisdiction in the court or judicial officer, of collusion between the parties, or of fraud in the party offering the record, in respect to the proceedings. En. March 11, 1872.

Cal. Rep. Cit. 71, 475; 79, 191; 97, 396; 138, 459.

§ 1917. The jurisdiction necessary in a judgment. The jurisdiction sufficient to sustain a record is jurisdiction over the cause, over the parties, and over the thing, when a specific thing is the subject of the judgment. En. March 11, 1872.

Cal. Rep. Cit. 66, 134.

§ 1918. Manner of proving other official documents. Other official documents may be proved as follows:

1. Acts of the executive of this state, by the records of the state department of the state; and of the United States, by the records of the state department of the United States, certified by the heads of those departments respectively. They may also be proved by public documents printed by order of the legislature or congress, or either house thereof.

2. The proceedings of the legislature of this state or of congress, by the journals of those bodies respectively, or either house thereof, or by published statutes or resolutions, or by copies certified by the clerk or printed by their order.

3. The acts of the executive, or the proceedings of the legislature of a sister state in the same manner.

4. The acts of the executive, or the proceedings of the legislature of a foreign country, by journals published by their authority, or commonly received in that country as such, or by a copy certified under the seal of the country or sovereign, or by a recognition thereof in some public act of the executive of the United States.

5. Acts of a municipal corporation of this state, or of a board or department thereof, by a copy certified by the legal keeper thereof, or by a printed book published by the authority of such corporation.

6. Documents of any other class in this state, by the original, or by a copy certified by the legal keeper thereof.

7. Documents of any other class in a sister state, by the original, or by a copy, certified by the legal keeper thereof, together with the certificate of the secretary of state, judge of the supreme, superior, or county court, or mayor of a city of such state, that the copy is duly certified by the officer having the legal custody of the original.

8. Documents of any other class in a foreign country, by the original, or by a copy, certified by the legal keeper thereof, with a certificate, under seal of the country or sovereign, that the document is a valid and subsisting document of such country and the copy is duly certified by the officer having the legal custody of the original.

9. Documents in the departments of the United States government, by the certificates of the legal custodian thereof. En. March 11, 1872. Am'd. 1873-4, 383.

Cal. Rep. Cit. 69, 495; 113, 55. Subd. 5—97, 597; 111, 49. Subd. 6—52, 187. Subd. 7—130, 39. Subd. 9—113, 54.

Certificate: Sec. 1923.

Documents in this state: Post, sec. 1920.

"Sister state" includes United States and territories: Post, sec. 1924.

§ 1919. Public record of private writing evidence. A public record of a private writing may be proved by the original record, or by a copy thereof, certified by the legal keeper of the record. En. March 11, 1872.

Cal. Rep. Cit. 50, 348; 52, 186; 59, 506; 63, 106; 70, 16; 70, 367; 70, 368; 89, 139; 91, 164.

Compare: Ante, sec. 1855.

Certificate: Post, sec. 1923.

Transcript from probate records: Ante, sec. 1429.

§ 1920. Entries in official books prima facie evidence. Entries in public or other official books or records, made in the performance of his duty by a public officer of this state, or by another person in the performance of a duty specially enjoined by law, are prima facie evidence of the facts stated therein. En. March 11, 1872. Am'd. 1873-4, 384.

Cal. Rep. Cit. 70, 570; 75, 303; 75, 448; 90, 187; 91, 164; 97, 597; 111, 49; 118, 71.

Official documents—Proof of: Ante, sec. 1918.

Entries—By officer or board, etc.: Post, sec. 1926.

§ 1921. Justice's judgment in other states, how proved. A transcript from the record or docket of a justice of the peace of a sister state, of a judgment rendered by him, of the proceedings in the action before the judgment, of the execution and return, if any, subscribed by the justice and verified in the manner prescribed in the next section, is admissible evidence of the facts stated therein. En. March 11, 1872.

Cal. Rep. Cit. 138, 462.

§ 1922. Same. There must be attached to the transcript a certificate of the justice that the transcript is in all respects correct, and that he had jurisdiction of the action, and also a further certificate of the clerk or prothonotary of the county in which the justice resided at the time of rendering the judgment, under the seal of the county, or the seal of the court of common pleas or county court thereof, certifying that the person subscribing the transcript was, at the date of the judgment, a justice of the peace in the county, and that the signature is genuine. Such judgment, proceedings, and jurisdiction may also be proved by the justice himself, on the production of his docket, or by a copy of the judgment, and his oral examination as a witness. En. March 11, 1872.

Cal. Rep. Cit. 138, 460; 138, 462.

§ 1923. Contents of other official certificates. Whenever a copy of a writing is certified for the purpose of evidence, the certificate must state in substance that the copy is a correct copy of the original, or of a specified part thereof, as the case may be. The certificate must be under the official seal of the certifying officer, if there be any, or if he be the clerk of a court having a seal, under the seal of such court. En. March 11, 1872. Am'd. 1873-4, 384.

Cal. Rep. Cit. 113, 54.

§ 1924. Provisions in relation to states apply to territories. The provisions of the preceding sections of this article applicable to the public writings of a sister state, are equally applicable to the public writings of the United States or a territory of the United States. En. March 11, 1872. Am'd. 1873-4, 385.

§ 1925. **Certificates of purchase primary evidence of ownership.** A certificate of purchase or of location of any lands in this state, issued or made in pursuance of any law of the United States or of this state, is primary evidence that the holder or assignee of such certificate is the owner of the land described therein; but this evidence may be overcome by proof that at the time of the location, or time of filing a pre-emption claim on which the certificate may have been issued, the land was in the adverse possession of the adverse party, or those under whom he claims, or that the adverse party is holding the land for mining purposes. En. March 11, 1872.

Cal. Rep. Cit. 51, 414; 52, 301; 59, 626; 63, 453; 75, 587; 84, 501; 84, 502; 87, 299; 90, 156; 91, 543; 91, 544; 91, 545; 125, 405.

§ 1926. **Entries made by officers or boards prima facie evidence.** An entry made by an officer, or board of officers, or under the direction and in the presence of either, in the course of official duty, is prima facie evidence of the facts stated in such entry. En. March 11, 1872. Am'd. 1873-4, 385.

Cal. Rep. Cit. 70, 570; 90, 187.

Return of sheriff is prima facie evidence: See Pol. Code, sec. 4178.

§ 1927. **U. S. mineral land patent, date of location is prima facie evidence.** Whenever any patent for mineral lands within the State of California, issued or granted by the United States of America, shall contain a statement of the date of the location of a claim or claims, upon which the granting or issuance of such patent is based, such statement shall be prima facie evidence of the date of such location. En. Stats. 1905, 78.

ARTICLE III.

PRIVATE WRITINGS.

- § 1929. Private writings classified.
- 1930. Seal defined.
- 1931. Seal, and how made.
- 1932. Effect of a seal.
- 1933. Execution of an instrument defined.
- 1934. Compromise of a debt without seal good.
- 1935. Subscribing witness defined.
- 1936. Books, maps, etc., how far evidence.
- 1937. Original writing to be produced or accounted for.
- 1938. When in possession of adverse party, notice to be given.
- 1939. Writings called for and inspected may be withheld.
- 1940. Writing, how proved.
- 1941. Other witnesses may also testify.
- 1942. When evidence of execution not necessary.
- 1943. Evidence of handwriting.
- 1944. Evidence of handwriting by comparison.
- 1945. Same.
- 1946. Entries of decedents, evidence in specified cases.
- 1947. Copies of entries also allowed.
- 1948. Private writings, how proved.
- 1949. County clerks to keep private papers deposited. (Repealed.)
- 1950. Removal of public records.
- 1951. Instrument conveying or affecting real property may be read in evidence.

§ 1929. Private writings classified. Private writings are either:

- 1. Sealed; or,
- 2. Unsealed. En. March 11, 1872.

No distinction—Between sealed and unsealed writings: Post, sec. 1932.

§ 1930. Seal defined. A seal is a particular sign, made to attest in the most formal manner, the execution of an instrument. En. March 11, 1872.

Prac. Act, sec. 454. En. April 29, 1851.

Seal generally: Ante, sec. 14; how made: Post, sec. 1931.

§ 1931. Seal, and how made. A public seal in this state is a stamp or impression made by a public officer with an instrument provided by law, to attest the execution of an official or public document, upon the paper, or upon any substance attached to the paper, which is capable of receiving a visible impression. A private seal may be made

in the same manner by any instrument, or it may be made by the scroll of a pen, or by writing the word "seal" against the signature of the writer. A scroll or other sign, made in a sister state or foreign country, and there recognized as a seal, must be so regarded in this state. En. March 11, 1872. Am'd. 1873-4, 385.

Scope of word "seal": Ante, sec. 14.

Impression of seal: See Civ. Code, sec. 1628.

Seals of courts: Ante, secs. 147-153.

§ 1932. **Effect of a seal.** There shall be no difference hereafter, in this state, between sealed and unsealed writings. A writing under seal may therefore be changed, or altogether discharged, by a writing not under seal. En. March 11, 1872. Am'd. 1873-4, 386.

Corresponding provisions: See Civ. Code, sec. 1629.

Agreement of composition requires no seal: Post, sec. 1934.

§ 1933. **Execution of an instrument defined.** The execution of an instrument is the subscribing and delivering it, with or without affixing a seal. En. March 11, 1872.

Cal. Rep. Cit. 99, 285; 101, 539; 114, 515; 130, 103.

§ 1934. **Compromise of a debt without seal good.** An agreement in writing without a seal for the compromise or settlement of a debt, is as obligatory as if a seal were affixed. En. March 11, 1872.

§ 1935. **Subscribing witness defined.** A subscribing witness is one who sees a writing executed or hears it acknowledged, and at the request of the party thereupon signs his name as a witness. En. March 11, 1872.

Cal. Rep. Cit. 134, 488.

§ 1936. **Books, maps, etc., how far evidence.** Historical works, books or science or art, and published maps or charts, when made by persons indifferent between the parties, are prima facie evidence of facts of general notoriety and interest. En. March 11, 1872. Am'd. 1873-4, 386.

Cal. Rep. Cit. 61, 552; 67, 15.

Books—As aid to court: Ante, sec. 1875; as evidence: Ante, sec. 1900; presumptions as to: Post, sec. 1963, subds. 35, 36.

§ 1937. Original writing to be produced or accounted for. The original writing must be produced and proved, except as provided in sections eighteen hundred and fifty-five and nineteen hundred and nineteen. If it has been lost, proof of the loss must first be made before evidence can be given of its contents. Upon such proof being made, together with proof of the due execution of the writing, its contents may be proved by a copy, or by a recital of its contents in some authentic document, or by the recollection of a witness, as provided in section eighteen hundred and fifty-five. En. March 11, 1872.

Cal. Rep. Cit. 113, 299.

§ 1938. When in possession of adverse party, notice to be given. If the writing be in the custody of the adverse party, he must first have reasonable notice to produce it. If he then fail to do so, the contents of the writing may be proved as in the case of its loss. But the notice to produce it is not necessary where the writing is itself a notice, or where it has been wrongfully obtained or withheld by the adverse party. En. March 11, 1872.

Cal. Rep. Cit. 59, 506; 132, 136.

Document in possession—Of opponent: Ante, sec. 1855, subd. 2.

Demanding inspection of writing: Ante, sec. 1000.

§ 1939. Writings called for and inspected may be withheld. Though a writing called for by one party is produced by the other, and is thereupon inspected by the party calling for it, he is not obliged to produce it as evidence in the case. En. March 11, 1872.

Writings shown to witness: Sec. 2054, post.

§ 1940. Writing, how proved. Any writing may be proved either:

1. By anyone who saw the writing executed; or,
2. By evidence of the genuineness of the handwriting of the maker; or,
3. By a subscribing witness. En. March 11, 1872. Am'd. 1873-4, 386.

Cal. Rep. Cit. 96, 587; 145, 85.

Proof of execution of writing—By admission: Post, sec. 1942.

Proof of handwriting: Post, sec. 1943.

Subscribing witness: Ante, sec. 1935; other evidence of execution when admissible: Post, secs. 1941-1945; on contest of will: Ante, sec. 1315.

§ 1941. Other witnesses may also testify. If the subscribing witness denies or does not recollect the execution of the writing, its execution may still be proved by other evidence. En. March 11, 1872.

§ 1942. When evidence of execution not necessary. Where, however, evidence is given that the party against whom the writing is offered has at any time admitted its execution, no other evidence of the execution need be given, when the instrument is one mentioned in section nineteen hundred and forty-five, or one produced from the custody of the adverse party, and has been acted upon by him as genuine. En. March 11, 1872.

§ 1943. Evidence of handwriting. The handwriting of a person may be proved by anyone who believes it to be his, and who has seen him write, or has seen writings purporting to be his, upon which he has acted or been charged, and who has thus acquired a knowledge of his handwriting. En. March 11, 1872.

Cal. Rep. Cit. 56, 474; 58, 289; 80, 85.

§ 1944. Evidence of handwriting by comparison. Evidence respecting the handwriting may also be given by a comparison, made by the witness or the jury, with writings admitted or treated as genuine by the party against whom the evidence is offered, or proved to be genuine to the satisfaction of the judge. En. March 11, 1872. Am'd. 1873-4, 386.

Cal. Rep. Cit. 56, 474; 58, 289; 80, 85; 116, 154; 121, 559; 128, 488.

§ 1945. Same. Where a writing is more than thirty years old, the comparisons may be made with writings purporting to be genuine, and generally respected and acted upon as such, by persons having an interest in knowing the fact. En. March 11, 1872.

Presumption—That ancient writing is genuine: Post, sec. 1963, subd. 34.

§ 1946. **Entries of decedents, evidence in specified cases.** The entries and other writings of a decedent, made at or near the time of the transaction, and in a position to know the facts stated therein, may be read as prima facie evidence of the facts stated therein, in the following cases:

1. When the entry was made against the interest of the person making it.

2. When it was made in a professional capacity, and in the ordinary course of professional conduct.

3. When it was made in the performance of a duty specially enjoined by law. En. March 11, 1872. Am'd. 1873-4, 386.

Cal. Rep. Cit. 134, 30.

Entries in books—Repeated: Post, sec. 1947; where alteration: Post, sec. 1982.

§ 1947. **Copies of entries also allowed.** When an entry is repeated in the regular course of business, one being copied from another at or near the time of the transaction, all the entries are equally regarded as originals. En. March 11, 1872.

Cal. Rep. Cit. 82, 166.

§ 1948. **Private writings, how proved.** Every private writing, except last wills and testaments, may be acknowledged or proved and certified in the manner provided for the acknowledgment of proof of conveyances of real property, and the certificate of such acknowledgment or proof is prima facie evidence of the execution of the writing in the same manner as if it were a conveyance of real property. En. March 11, 1872. Am'd. 1873-4, 387.

Cal. Rep. Cit. 83, 272.

Conveyance of real property—As evidence: Post, sec. 1951.

§ 1949. **County clerks to keep private papers deposited.** En. March 11, 1872. Rep. 1873-4, 387.

§ 1950. **Removal of public records.** The record of a conveyance of real property, or any other record, a tran-

script of which is admissible in evidence, must not be removed from the office where it is kept, except upon the order of a court, in cases where the inspection of the record is shown to be essential to the just determination of the cause or proceeding pending, or where the court is held in the same building with such office. En. March 11, 1873-4, 388. Am'd. 1889, 45.

Cal. Rep. Cit. 113, 267.

§ 1951. Instrument conveying or affecting real property may be read in evidence. Every instrument conveying or affecting real property, acknowledged or proved and certified, as provided in the Civil Code, may, together with the certificate of acknowledgment or proof, be read in evidence in an action or proceeding, without further proof; also, the original record of such conveyance or instrument thus acknowledged or proved, or a certified copy of the record of such conveyance or instrument thus acknowledged or proved, may be read in evidence, with the like effect as the original instrument, without further proof. En. Stats. 1873-4, 388. Am'd. 1889 45.

Cal. Rep. Cit. 70, 15; 70, 16; 70, 367; 74, 429; 80, 536; 89, 139; 91, 163; 91, 164; 103, 111; 120, 315; 135, 314; 135, 319; 139, 557; 144, 34.

Certified copy, etc.: Sec. 1948, ante.

CHAPTER IV.

MATERIAL OBJECTS PRESENTED TO THE SENSES, OTHER THAN WRITINGS.

§ 1954. Material objects.

§ 1954. Material objects. Whenever an object, cognizable by the senses, has such a relation to the fact in dispute as to afford reasonable grounds of belief respecting it, or to make an item in the sum of the evidence, such object may be exhibited to the jury, or its existence, situation, and character may be proved by witnesses. The admission of such evidence must be regulated by the sound discretion of the court. En. March 11, 1872.

Cal. Rep. Cit. 107, 209; 134, 507; 146, 132.

CHAPTER V.

INDIRECT EVIDENCE, INFERENCES, AND PRESUMPTIONS.

- § 1957. Indirect evidence classified.
- § 1958. Inference defined.
- § 1959. Presumption defined.
- § 1960. When an inference arises.
- § 1961. Presumptions may be controverted, when.
- § 1962. Specification of conclusive presumptions.
- § 1963. All other presumptions may be controverted.

§ 1957. Indirect evidence classified. Indirect evidence is of two kinds:

1. Inferences; and,
2. Presumptions. En. March 11, 1872.

Cal. Rep. Cit. 59, 300; 79, 307; 79, 308; 83, 510; 141, 63; 143, 398.

§ 1958. Inference defined. An inference is a deduction which the reason of the jury makes from the facts proved, without an express direction of law to that effect. En. March 11, 1872.

Cal. Rep. Cit. 59, 300; 82, 438; 114, 46; 130, 7; 143, 398.

§ 1959. Presumption defined. A presumption is a deduction which the law expressly directs to be made from particular facts. En. March 11, 1872.

Cal. Rep. Cit. 75, 100; 79, 307; 135, 180; 135, 319; 137, 34; 143, 398; 143, 647.

§ 1960. When an inference arises. An inference must be founded:

1. On a fact legally proved; and,
2. On such a deduction from that fact as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature. En. March 11, 1872.

Cal. Rep. Cit. 59, 300; 75, 100; 143, 263; 143, 398; 143, 647.

Subd. 1—139, 123. Subd. 2—106, 529; 130, 7; 141, 63.

§ 1961. Presumptions may be controverted, when. A presumption (unless declared by law to be conclusive) may be controverted by other evidence, direct or indirect; but unless so controverted, the jury are bound to find according to the presumption. En. March 11, 1872.

Cal. Rep. Cit. 79, 307; 83, 272; 83, 510; 89, 295; 130, 7; 135, 319; 143, 648; 144, 702.

§ 1962. Specification of conclusive presumptions. The following presumptions, and no others, are deemed conclusive:

1. A malicious and guilty intent, from the deliberate commission of an unlawful act, for the purpose of injuring another;

2. The truth of the facts recited, from the recital in a written instrument between the parties thereto, or their successors in interest by a subsequent title; but this rule does not apply to the recital of a consideration:

3. Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it;

4. A tenant is not permitted to deny the title of his landlord at the time of the commencement of the relation;

5. The issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate;

6. The judgment or order of a court, when declared by this code to be conclusive; but such judgment or order must be alleged in the pleadings, if there be an opportunity to do so; if there be no such opportunity, the judgment or order may be used in evidence.

7. Any other presumption which, by statute, is expressly made conclusive. En. March 11, 1872.

Cal. Rep. Cit. 70, 105; 70, 442; 89, 295; 89, 296; 128, 274; 145, 140. Subd. 1—139, 69; 146, 528; 142, 530. Subd. 2—63, 540; 74, 411; 96, 109; 96, 110, 113, 389; 118, 99; 131, 383; 142, 15. Subd. 3—82, 83; 82, 453; 90, 162; 107, 295; 109, 220; 110, 106; 115, 365; 130, 539; 134, 444; 142, 42; 142, 115; 143, 504. Subd. 4—70, 107. Subd. 5—137, 301; 137, 303; 142, 627.

Subd. 3. Standing by, etc.: Civ. Code, sec. 1709.

Subd. 4. Tenant denying landlord's title: Civ. Code, sec. 1948.

Subd. 5. Judgments, etc.: Ante, sec. 1908.

Decree allowing executors, etc., accounts: Ante, sec. 1638; evidence of notice on application for letters of administration: Ante, sec. 1376; probate: Ante, sec. 1333; conclusive evidence generally: Post, sec. 1978.

§ 1963. All other presumptions may be controverted. All other presumptions are satisfactory, if uncontradicted. They are denominated disputable presumptions, and may

be controverted by other evidence. The following are of that kind:

1. That a person is innocent of crime or wrong;
2. That an unlawful act was done with an unlawful intent;
3. That a person intends the ordinary consequence of his voluntary act;
4. That a person takes ordinary care of his own concerns;
5. That evidence willfully suppressed would be adverse if produced;
6. That higher evidence would be adverse from inferior being produced;
7. That money paid by one to another was due to the latter;
8. That a thing delivered by one to another belonged to the latter;
9. That an obligation delivered up to the debtor has been paid;
10. That former rent or installments have been paid when a receipt for later is produced;
11. That things which a person possesses are owned by him;
12. That a person is the owner of property from exercising acts of ownership over it, or from common reputation of his ownership;
13. That a person in possession of an order on himself for the payment of money, or the delivery of a thing, has paid the money or delivered the thing accordingly;
14. That a person acting in a public office was regularly appointed to it;
15. That official duty has been regularly performed;
16. That a court or judge, acting as such, whether in this state or any other state or country, was acting in the lawful exercise of his jurisdiction;
17. That a judicial record, when not conclusive does still correctly determine or set forth the rights of the parties;
18. That all matters within an issue were laid before the jury and passed upon by them; and in like manner, that all matters within a submission to arbitration were laid before the arbitrators and passed upon by them;
19. That private transactions have been fair and regular;
20. That the ordinary course of business has been followed;

21. That a promissory note or bill of exchange was given or indorsed for a sufficient consideration;

22. That an indorsement of a negotiable promissory note or bill of exchange was made at the time and place of making the note or bill;

23. That a writing is truly dated;

24. That a letter duly directed and mailed was received in the regular course of the mail;

25. Identity of person from identity of name;

26. That a person not heard from in seven years is dead;

27. That acquiescence followed from a belief that the thing acquiesced in was conformable to the right or fact;

28. That things have happened according to the ordinary course of nature and the ordinary habits of life;

29. That persons acting as copartners have entered into contract of copartnership;

30. That a man and woman deporting themselves as husband and wife have entered into a lawful contract of marriage;

31. That a child born in lawful wedlock, there being no divorce from bed and board, is legitimate;

32. That a thing once proved to exist continues as long as is usual with things of that nature;

33. That the law has been obeyed;

34. That a document or writing more than thirty years old, is genuine, when the same has been since generally acted upon as genuine, by persons having an interest in the question, and its custody has been satisfactorily explained.

35. That a printed and published book, purporting to be printed or published by public authority, was so printed or published;

36. That a printed and published book, purporting to contain reports of cases adjudged in the tribunals of the state or country where the book is published, contains correct reports of such cases;

37. That a trustee or other person, whose duty it was to convey real property to a particular person has actually conveyed to him, when such presumption is necessary to perfect the title of such person or his successor in interest;

38. The uninterrupted use by the public of land for a burial ground, for five years, with the consent of the owner and without a reservation of his rights, is presumptive evidence of his intention to dedicate it to the public for that purpose;

39. That there was a good and sufficient consideration for a written contract;

40. When two persons perish in the same calamity, such as a wreck, a battle, or a conflagration, and it is not shown who died first, and there are no particular circumstances from which it can be inferred, survivorship is presumed from the probabilities resulting from the strength, age, and sex, according to the following rules:

First.—If both of those who have perished were under the age of fifteen years, the older is presumed to have survived;

Second.—If both were above the age of sixty; the younger is presumed to have survived;

Third.—If one be under fifteen and the other above sixty, the former is presumed to have survived;

Fourth.—If both be over fifteen and under sixty, and the sexes be different, the male is presumed to have survived; if the sexes be the same, then the older;

Fifth.—If one be under fifteen or over sixty, and the other between those ages, the latter is presumed to have survived. En. March 11, 1872.

Cal. Rep. Cit. 81, 325; 89, 295; 105, 65; 113, 405; 122, 499; 129, 328; 129, 389; 132, 212; 137, 283; 146, 121. Subd. 1—81, 233; 111, 267; 134, 211; 134, 443; 134, 615; 137, 223; 144, 701; 144, 707. Subd. 2—83, 382; 86, 147; 112, 371. Subd. 3—134, 443. Subd. 4—76, 652; 134, 488; 139, 525; 142, 69; 142, 132. Subd. 5—130, 356; 133, 241; 141, 60; 143, 167. Subd. 6—122, 493; 130, 356; 130, 357; 133, 241; 140, 399; 143, 167. Subd. 8—106, 655; 119, 467. Subd. 9—79, 566; 106, 529; 125, 621. Subd. 10—142, 69. Subd. 11—69, 202; 83, 166; 106, 655; 139, 525; 142, 69; 144, 701. Subd. 12—83, 166; 99, 372; 139, 525. Subd. 14—53, 30; 67, 184; 77, 47; 97, 177; 108, 542; 128, 398; 139, 558; 144, 701. Subd. 15—56, 589; 68, 484; 71, 24; 71, 208; 75, 451; 76, 152; 77, 47; 78, 299; 79, 503; 81, 233; 82, 516; 83, 449; 87, 48; 97, 597; 100, 321; 107, 186; 108, 542; 109, 691; 111, 49; 117, 702; 121, 197; 126, 555; 129, 328; 130, 39; 132, 506; 133, 390; 134, 211; 135, 180; 135, 231; 136, 244; 136, 406; 138, 227; 142, 450; 145, 470. Subd. 16—97, 177; 122, 206; 128, 398; 132, 506; 133, 390; 135, 180; 143, 278. Subd. 18—61, 132; 98, 632. Subd. 19—85, 61; 137, 35; 144, 707. Subd. 20—81, 233; 83, 483; 106, 529; 126, 49; 142, 69. Subd. 21—96, 110; 106, 655; 140, 546. Subd. 22—106, 655. Subd. 24—99, 73;

112, 371; 129, 24; 132, 76. Subd. 25—61, 543; 75, 100; 75, 244; 113, 405; 119, 368; 128, 555; 144, 701. Subd. 26—71, 267; 138, 289. Subd. 28—76, 297; 81, 233; 139, 525; 142, 69; 144, 707. Subd. 30.—82, 453. Subd. 32—60, 419; 69, 418; 71, 121; 79, 310; 81 405; 85, 502; 98, 660; 119, 56; 128, 398; 128, 631; 143, 168. Subd. 33—81, 233; 123, 631; 126, 49. Subd. 34—139, 389. Subd. 39—83, 483; 96, 110; 129, 389. Subd. 40—65, 54; 76, 652.

Subds. 17, 18. Proceedings of courts: Ante, sec. 1908.

Subd. 20. Ordinary course of business has been followed: Sec. 1960.

Subd. 21. Note or bill imports a consideration.—A written instrument is presumptive evidence of a consideration: Civ. Code, sec. 1614. The burden of showing a want of consideration sufficient to support an instrument lies with the party seeking to invalidate or avoid it: Civ. Code, sec. 1615; and see subd. 39 of this section.

Subd. 31. Legitimacy: See Civ. Code, sec. 193.

Other presumptions.—Transcript to shorthand notes is *prima facie* evidence: Sec. 273, ante; order of probate court for disclosure of property of estate: Sec. 1460, ante; conveyance executed by executor, etc.: Sec. 1601, ante. Affidavits on sales of stock for delinquent assessments; Civ. Code, sec. 348.

Affidavits and entries in partnership proceedings: Civ. Code, secs. 2471, 2485.

Protest of notary is *prima facie* evidence: Pol. Code, sec. 795.

Books and records of regiments, etc., and proceedings are *prima facie* evidence: Pol. Code, sec. 1935.

The secretary of the fire department, or fire company, must keep a record of all certificates of exemption or active membership, the date thereof and to whom issued. Certificate of fire department is *prima facie* evidence of the facts therein stated: Pol. Code, sec. 3341.

Surveys and maps of boundary lines are *prima facie* evidence: Pol. Code, sec. 3973.

CHAPTER VI.

INDISPENSABLE EVIDENCE.

- § 1967. Indispensable evidence, what.
- 1968. To prove perjury and treason, more than one witness required.
- 1969. Will to be in writing.
- 1970. Will, how revoked.
- 1971. Transfer of real property to be in writing.
- 1972. Last section not to extend to certain cases.
- 1973. Agreement not in writing, when invalid.
- § 1974. Representation of credit by writing.

§ 1967. Indispensable evidence, what. The law makes certain evidence necessary to the validity of particular acts, or the proof of particular facts. En. March 11, 1872.

§ 1968. To prove perjury and treason, more than one witness required. Perjury and treason must be proved by testimony of more than one witness. Treason by the testimony of two witnesses to the same overt act; and perjury by the testimony of two witnesses, or one witness and corroborating circumstances. En. March 11, 1872.

Cal. Rep. Cit. 103, 631; 104, 417; 118, 51; 118, 53; 118, 54; 131, 257; 131, 260; 139, 601; 139, 603; 144, 286; 146, 117.

Two witnesses—For probate of lost will: Ante, sec. 1339.

§ 1969. Will to be in writing. A last will and testament, except a nuncupative will, is invalid, unless it be in writing and executed with such formalities as are required by law. When, therefore, such a will is to be shown, the instrument itself must be produced, or secondary evidence of its contents be given. En. March 11, 1872. Am'd. 1873-4, 388.

Lost or destroyed will—Probate of: Ante, secs. 1338-1341.

§ 1970. Will, how revoked. A written will cannot be revoked or altered otherwise than as provided in the Civil Code. En. March 11, 1872. Am'd. 1873-4, 388.

Cal. Rep. Cit. 107, 5.

Revocation or alteration of will: See Civ. Code, secs. 1292 et seq.

§ 1971. Transfer of real property to be in writing. No estate or interest in real property, other than for leases for a term not exceeding one year, nor any trust or power over or concerning it, or in any manner relating thereto, can be created, granted, assigned, surrendered, or declared, otherwise than by operation of law, or a conveyance or other instrument in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by his lawful agent thereunto authorized by writing. En. March 11, 1872.

Cal. Rep. Cit. 64, 26; 70, 317; 76, 471; 78, 534; 80, 518; 81, 207; 91, 398; 122, 427; 132, 322; 141, 228; 144, 782.

Scope of section—Application restricted by: Sec. 1972, post.

Corresponding provisions: Civ. Code, sec. 1091.

Real property—Estate, interest, etc., in: Compare post, sec. 1973, subd. 5.

Trust: Civ. Code, sec. 852.

Grant, etc.: Civ. Code, sec. 1053.

§ 1972. Last section not to extend to certain cases. The preceding section must not be construed to affect the power of a testator in the disposition of his real property by a last will and testament, nor to prevent any trust from arising or being extinguished by implication or operation of law, nor to abridge the power of any court to compel the specific performance of an agreement, in case of part performance thereof. En. March 11, 1872.

Cal. Rep. Cit. 64, 26; 65, 509; 121, 44.

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Specific performance: Civ. Code, secs. 3384 et seq.

§ 1973. Agreement not in writing, when invalid. In the following cases the agreement is invalid, unless the same or some note or memorandum thereof be in writing, and subscribed by the party charged, or by his agent. Evidence, therefore, of the agreement, cannot be received without the writing or secondary evidence of its contents:

1. An agreement that by its terms is not to be performed within a year from the making thereof;

2. A special promise to answer for the debt, default, or miscarriage of another, except in the cases provided for in section twenty-seven hundred and ninety-four of the Civil Code;

3. An agreement made upon consideration of marriage, other than a mutual promise to marry;

4. An agreement for the sale of goods, chattels, or things in action, at a price not less than two hundred dollars, unless the buyer accept and receive part of such goods and chattels, or the evidences, or some of them, of such things in action, or pay at the time some part of the purchase money; but when a sale is made by auction, an entry by the auctioneer in his sale-book, at the time of the sale, of the kind of property sold, the terms of sale, the price, and the names of the purchaser and person on whose account the sale is made, is a sufficient memorandum;

5. An agreement for the leasing for a longer period than one year, or for the sale of real property, or of an interest therein, and such agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent be in writing, subscribed by the party sought to be charged. En. March 11, 1872.

Cal. Rep. Cit. 64, 26; 72, 144; 77, 282; 78, 534; 81, 207; 91, 398; 93, 495; 105, 519; 111, 285. Subd. 4—117, 47. Subd. 5—121, 44; 140, 159.

Corresponding provision: Civ. Code, sec. 1624.

Agreement for sale of goods, etc.—Corresponding provision: Civ. Code, sec. 1739; auction sale: Civ. Code, sec. 1798; Pol. Code, sec. 3292; agreement to manufacture: Civ. Code, sec. 1740.

Parol evidence, when admissible to explain writing: Ante, sec. 1856.

Guaranty to be in writing: Civ. Code, secs. 2793, 2794.

Guaranty by executor: Ante, sec. 1612.

Preventing contract being put into writing by fraud: See Civ. Code, sec. 1623.

§ 1974. Representation of credit by writing. No evidence is admissible to charge a person upon a representation as to the credit of a third person, unless such representation, or some memorandum thereof, be in writing, and either subscribed by, or in the handwriting of, the party to be charged. En. March 11, 1872.

CHAPTER VII.

CONCLUSIVE OR UNANSWERABLE EVIDENCE.

§ 1973. Conclusive or unanswerable evidence.

§ 1978. Conclusive or unanswerable evidence. No evidence is by law made conclusive or unanswerable, unless so declared by this code. En. March 11, 1872.

TITLE III.

OF THE PRODUCTION OF EVIDENCE.

Chapter I. By Whom to be Produced, §§ 1981, 1982.

II. Means of Production, §§ 1985-1997.

III. Manner of Production, §§ 2002-2054.

CHAPTER I.

BY WHOM TO BE PRODUCED.

§ 1981. Evidence to be produced, by whom.

§ 1982. Writing altered, who to explain.

§ 1981. Evidence to be produced, by whom. The party holding the affirmative of the issue must produce the evidence to prove it; therefore, the burden of proof lies on the party who would be defeated if no evidence were given on either side. En. March 11, 1872.

Cal. Rep. Cit. 68, 10; 81, 403; 94, 175; 106, 697; 128, 62; 137, 283; 140, 421; 140, 430; 140, 432; 140, 439.

Burden of proof: Ante, sec. 1869.

§ 1982. Writing altered, who to explain. The party producing a writing as genuine which has been altered, or appears to have been altered, after its execution, in a part material to the question in dispute, must account for the appearance or alteration. He may show that the alteration was made by another, without his concurrence, or was made with the consent of the parties affected by it, or otherwise properly or innocently made, or that the altera-

tion did not change the meaning or language of the instrument. If he do that, he may give the writing in evidence, but not otherwise. En. March 11, 1872.

Cal. Rep. Cit. 56, 214; 80, 265; 89, 616; 94, 367; 142, 205.
 Prac. Act, sec. 448. En. April 29, 1851.

CHAPTER II.

MEANS OF PRODUCTION.

- 1985. Subpoena for witness defined.
- 1986. Subpoena, how issued.
- 1987. Subpoena, how served.
- 1988. How, if witness be concealed.
- 1989. When a witness is compelled to attend.
- 1990. Person present compelled to testify.
- 1991. Disobedience, how punished.
- 1992. Forfeiture therefor.
- 1993. Warrant may issue to bring witness, when.
- 1994. Contents of warrant.
- 1995. If witness be a prisoner, how brought.
- 1996. On whose motion.
- 1997. How examined.

§ 1985. Subpoena for witness defined. The process by which the attendance of a witness is required is a subpoena. It is a writ or order directed to a person and requiring his attendance at a particular time and place to testify as a witness. It may also require him to bring with him any books, documents, or other things under his control, which he is bound by law to produce in evidence. En. March 11, 1872.

Cal. Rep. Cit. 126, 239.

Prac. Act, sec. 402. En. April 29, 1851. Am'd. 1855, 197.

§ 1986. Subpoena, how issued. The subpoena is issued as follows:

1. To require attendance before a court, or at the trial of an issue therein, it is issued under the seal of the court before which the attendance is required, or in which the issue is pending;

2. To require attendance out of the court, before a judge, justice, or other officer authorized to administer oaths or take testimony in any manner under the laws of this state, it is issued by the judge, justice, or any other officer before whom the attendance is required;

5. To require attendance before a commissioner appointed to take testimony by a court of a foreign country, or of the United States, or of any other state in the United States, or of any other district or county within this state, or before any officer or officers empowered by the laws of the United States to take testimony, it may be issued by any judge or justice of the peace in places within their respective jurisdiction, with like power to enforce attendance; and, upon certificate of contumacy to said court, to punish contempt of their process, as such judge or justice could exercise if the subpoena directed the attendance of the witness before their courts in a matter pending therein. En. March 11, 1872.

Cal. Rep. Cit. 56, 599; 72, 511; 140, 219. Subd. 2—64, 401; 140, 14. Subd. 3—72, 282.

Prac. Act, sec. 403. En. April 29, 1851. Am'd. 1859, 218; 1866, 708.

§ 1937. Subpoena, how served. The service of a subpoena is made by showing the original and delivering a copy, or a ticket containing its substance, to the witness personally, giving or offering to him at the same time, if demanded by him, the fees to which he is entitled for travel to and from the place designated, and one day's attendance there. The service must be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance. Such service may be made by any person. En. March 11, 1872.

Prac. Act, sec. 404. En. April 29, 1851.

Costs where subpoena served by person other than sheriff: See post, Appendix, title Costs.

§ 1938. How, if witness be concealed. If a witness is concealed in a building or vessel, so as to prevent the service of a subpoena upon him, any court or judge, or any officer issuing the subpoena, may, upon proof by affidavit of the concealment, and of the materiality of the witness, make an order that the sheriff of the county serve the subpoena; and the sheriff must serve it accordingly, and for that purpose may break into the building or vessel where the witness is concealed. En. March 11, 1872.

Prac. Act, sec. 405. En. April 29, 1851.

§ 1989. When a witness is compelled to attend. A witness is not obliged to attend as a witness before any court, judge, justice, or any other officer, out of the county in which he resides, unless the distance be less than thirty miles from his place of residence to the place of trial. En. March 11, 1872.

Cal. Rep. Cit. 56, 599; 140, 8.

§ 1990. Person present compelled to testify. A person present in court, or before a judicial officer, may be required to testify in the same manner, as if he were in attendance upon a subpoena issued by such court or officer. En. March 11, 1872.

§1991 Am'd. Prac. Act, sec. 406. En. April 29, 1851.

p. 515 § 1991. Disobedience, how punished. Disobedience to a subpoena, or a refusal to be sworn, or to answer as a witness, or to subscribe an affidavit or deposition when required, may be punished as a contempt by the court or officer issuing the subpoena or requiring the witness to be sworn; and if the witness be a party, his complaint or answer may be stricken out. En. March 11, 1872.

Cal. Rep. Cit. 56, 599; 72, 511; 78, 373; 84, 533; 88, 623; 120, 42; 139, 472; 140, 8; 140, 12; 140, 13; 140, 14; 140, 217; 140, 219; 140, 221; 144, 160.

Prac. Act, sec. 409. En. April 29, 1851.

Cal. Rep. Cit. 28, 298.

Refusal to answer: Post, sec. 2065.

Contempt: Ante, secs. 1209 et seq.

§ 1992. Forfeiture therefor. A witness disobeying a subpoena also forfeits to the party aggrieved the sum of one hundred dollars, and all damages which he may sustain by the failure of the witness to attend, which forfeiture and damages may be recovered in a civil action. En. March 11, 1872.

Cal. Rep. Cit. 135, 49; 135, 50; 135, 51.

Prac. Act, sec. 410. En. April 29, 1851.

§ 1993. Warrant may issue to bring witness, when. In case of failure of a witness to attend, the court or officer issuing the subpoena, upon proof of the service thereof, and of the failure of the witness, may issue a warrant to the sheriff of the county to arrest the witness and bring

him before the court or officer where his attendance was required. En. March 11, 1872.

Cal. Rep. Cit. 116, 687.

Prac. Act, sec. 411. En. April 29, 1851.

§ 1994. **Contents of warrant.** Every warrant of commitment, issued by a court or officer pursuant to this chapter, must specify therein, particularly, the cause of the commitment, and if it be for refusing to answer a question, such question must be stated in the warrant. And every warrant to arrest or commit a witness, pursuant to this chapter, must be directed to the sheriff of the county where the witness may be, and must be executed by him in the same manner as process issued by the superior court. En. March 11, 1872. Am'd. 1880, 115.

§ 1995. **If witness be a prisoner, how brought.** If the witness be a prisoner, confined in a jail or prison within this state, an order for his examination in the prison upon deposition, or for his temporary removal and production before a court or officer, for the purpose of being orally examined, may be made as follows:

1. By the court itself in which the action or special proceeding is pending, unless it be a justice's court.

2. By a justice of the supreme court, or a judge of the superior court of the county where the action or proceeding is pending, if pending before a justice's court, or before a judge or other person out of court. En. March 11, 1872. Am'd. 1880, 115.

Prac. Act, sec. 412. En. April 29, 1851.

§ 1996. **On whose motion.** Such order can only be made on the motion of a party, upon affidavit showing the nature of the action or proceeding, the testimony expected from the witness, and its materiality. En. March 11, 1872.

Prac. Act, sec. 413. En. April 29, 1851.

§ 1997. **How examined.** If the witness be imprisoned in the county where the action or proceeding is pending, his production may be required. In all other cases his examination, when allowed, must be taken upon deposition. En. March 11, 1872.

Prac. Act, sec. 414. En. April 29, 1851.

CHAPTER III.

MANNER OF PRODUCTION.

Article I. Mode of Taking the Testimony of Witnesses, §§ 2002-2006.

II. Affidavits, §§ 2009-2015.

III. Depositions, §§ 2019-2021.

IV. Manner of Taking Depositions out of the State, §§ 2024-2028.

V. Manner of Taking Depositions in the State, §§ 2031-2033.

VI. General Rules of Examination, §§ 2042-2054.

ARTICLE I.

MODE OF TAKING THE TESTIMONY OF WITNESSES.

§ 2002. Testimony, in what mode taken.

§ 2003. Affidavit defined.

§ 2004. A deposition defined.

§ 2005. Oral examination defined.

§ 2006. Deposition, how taken.

§ 2002. Testimony, in what mode taken. The testimony of witnesses is taken in three modes:

1. By affidavit;

2. By deposition;

3. By oral examination. En. March 11, 1872.

Cal. Rep. Cit. 87, 113. Subd. 1—129, 651. Subd. 3—129, 563.

§ 2003. Affidavit defined. An affidavit is a written declaration under oath, made without notice to the adverse party. En. March 11, 1872.

Affidavits: Post, secs. 2009 et seq.

§ 2004. A deposition defined. A deposition is a written declaration under oath, made upon notice to the adverse party for the purpose of enabling him to attend and cross-examine. En. March 11, 1872.

Cal. Rep. Cit. 77, 629.

Depositions: Post, secs. 2019-2021; form of: Post, sec. 2006.

§ 2005. Oral examination defined. An oral examination is an examination in presence of the jury or tribunal which is to decide the fact or act upon it, the testimony

being heard by the jury or tribunal from the lips of the witness. En. March 11, 1872.

Cal. Rep. Cit. 77, 629; 132, 201.

General rules of examination: Post, secs. 2042-2054.

§2006 Am'd. p. 516 § 2006. Deposition, how taken. Deposition must be taken in the form of question and answer, and the words of the witness must be written down, unless the parties agree to a different mode. En. March 11, 1872.

Cal. Rep. Cit. 125, 115.

ARTICLE II.

AFFIDAVITS.

§ 2009. For what purposes may be used.

§ 2010. Evidence of publication, what.

§ 2011. Filing evidence of publication.

§ 2012. Affidavits to be used in this state, before whom may be taken in this state.

§ 2013. Affidavit out of state, how taken.

§ 2014. If made in a foreign country, before whom taken.

§ 2015. Certificate of the clerk, if taken before a judge of a court out of this state.

§ 2009. For what purposes may be used. An affidavit may be used to verify a pleading or a paper in a special proceedings, to prove the service of a summons, notice, or other paper in an action or special proceeding, to obtain a provisional remedy, the examination of a witness, or a stay of proceedings, or upon a motion, and in any other case expressly permitted by some other provision of this code. En. March 11, 1872.

Cal. Rep. Cit. 129, 651; 141, 556; 142, 426.

Affidavit: Post, secs. 2010, 2011.

§ 2010. Evidence of publication, what. Evidence of the publication of a document or notice required by law, or by an order of a court or judge to be published in a newspaper, may be given by the affidavit of the printer of the newspaper, or his foreman or principal clerk, annexed to a copy of the document or notice, specifying the times when and the paper in which the publication was made. En. March 11, 1872.

Cal. Rep. Cit. 91, 437; 97, 447; 131, 252.

Affidavit of publication: Ante, sec. 413.

§ 2011. Filing evidence of publication. If such affidavit be made in an action or special proceeding pending in a court, it may be filed with the court or a clerk thereof. If not so made, it may be filed with the clerk of the county where the newspaper is printed. In either case, the original affidavit, or a copy thereof, certified by the judge of the court or clerk having it in custody, is prima facie evidence of the facts stated therein. En. March 11, 1872. Am'd. 1873-4, 388.

Cal. Rep. Cit. 88, 34; 131, 252.

§ 2012. Affidavits to be used in this state, before whom may be taken in this state. An affidavit to be used before any court, judge or officer of this state, may be taken before any judge or clerk of any court, or any justice of the peace or notary public in this state. En. March 11, 1872.

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Cal. Rep. Cit. 56, 465; 128, 420; 128, 421.

Prac. Act, sec. 424. En. April 29, 1851.

Persons authorized to take affidavits: Ante, sec. 179, subd. 3.

§ 2013. Affidavit out of state, how taken. An affidavit taken in another state of the United States, to be used in this state, may be taken before a commissioner appointed by the governor of this state to take affidavits and depositions in such other state, or before any notary public in another state, or before any judge or clerk of a court of record having a seal. En. March 11, 1872. Am'd. 1873-4, 389.

Prac. Act, sec. 425. En. April 29, 1851.

§ 2014. If made in a foreign country, before whom taken. An affidavit taken in a foreign country to be used in this state, may be taken before an ambassador, minister, consul, vice-consul, or consular agent of the United States, or before any judge of a court of record having a seal, in such foreign country. En. March 11, 1872. Am'd. 1873-4, 389.

Prac. Act, sec. 426. En. April 29, 1851.

§ 2015. Certificate of the clerk, if taken before a judge of a court out of this state. When an affidavit is taken before a judge or a court in another state, or in a foreign country, the genuineness of the signature of the judge, the existence of the court and the fact that such judge is a member thereof, must be certified by the clerk of the court, under the seal thereof. En. March 11, 1872.

Prac. Act, sec. 427. En. April 29, 1851.

ARTICLE III.

DEPOSITIONS.

§ 2019. Deposition, when used.

§ 2020. Testimony of a witness out of the state, when taken.

§ 2021. In the state, when taken.

§ 2019. Deposition, when used. In all cases other than those mentioned in section two thousand and nine, where a written declaration under oath is used, it must be a deposition as prescribed by this code. En. March 11, 1872.

Cal. Rep. Cit. 83, 32.

Prac. Act, sec. 620. En. April 29, 1851.

§ 2020. Testimony of a witness out of the state, when taken. The testimony of a witness out of the state may be taken by deposition, in an action, at any time after the service of the summons or the appearance of the defendant; and, in a special proceeding, at any time after a question of fact has arisen therein. En. March 11, 1872.

Cal. Rep. Cit. 140, 8.

Prac. Act, sec. 432. En. April 29, 1851.

Manner of taking depositions out of the state: Secs. 2024 et seq.

§ 2021. In the state, when taken. The testimony of a witness in this state may be taken by deposition in an action at any time after the service of the summons or the appearance of the defendant, and in a special proceeding after a question of fact has arisen therein, in the following cases:

1. When the witness is a party to the action or proceeding, or an officer or member of a corporation which is a party to the action or proceeding, or a person for whose immediate benefit the action or proceeding is prosecuted or defended;

2. When the witness resides out of the county in which his testimony is to be used, or resides in the county but

more than fifty miles distant from the place of trial or hearing by the nearest usual traveled route;

3. When the witness is about to leave the county where the action is to be tried, and will probably continue absent when the testimony is required;

4. When the witness, otherwise liable to attend the trial, is nevertheless too infirm to attend;

5. When the testimony is required upon a motion, or in any other case where the oral examination of the witness is not required;

6. When the witness is the only one who can establish facts or a fact material to the issue; provided, that the deposition of such witness shall not be used if his presence can be procured at the time of the trial of the cause. En. March 11, 1872. Am'd. 1875-6, 105; 1877-8, 112; 1905, 137.

Cal. Rep. Cit. 56, 599; 83, 32; 140, 8; 140, 420. Subd.

1—74, 47; 117, 49. Subd. 2—63, 370; 74, 47. Subd.

3—74, 47. Subd. 4—74, 47. Subd. 5—129, 563.

Prac. Act, sec. 428. En. April 29, 1851.

Cal. Rep. Cit. 3, 97.

Deposition: Mode of taking: Sec. 2006; who may take: Sec. 179, subd. 3; in this state, manner of taking: Secs. 2031 et seq.

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ARTICLE IV.

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MANNER OF TAKING DEPOSITIONS OUT OF THE STATE.

§ 2024. How taken. Justice's court. To whom directed.

§ 2025. Proper interrogatories may be prepared, or may be waived by the parties.

§ 2025½. On oral interrogatories.

§ 2026. Authorities and duties of commissioner.

§ 2027. Trial, when postponed for reason of nonreturn of commission.

§ 2028. Deposition, by whom used.

§ 2024. How taken. Justice's court. To whom directed. The deposition of a witness out of this state may be taken upon a commission issued from the court under the seal of the court, upon an order of the court or a judge or a justice thereof, on the application of either party, upon five days' previous notice to the other. If the court be a justice's court, the commission shall have attached to it a certificate, under seal by the county clerk of such

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county, to the effect that the person issuing the same was an acting justice of the peace at the date of the commission. If issued to any place within the United States, it may be directed to a person agreed upon by the parties, or if they do not agree, to any judge or justice of the peace or commissioner selected by the court or judge or justice issuing it. If issued to any country out of the United States, it may be directed to a minister, ambassador, consul, vice-consul, or consular agent of the United States in such country, or to any person agreed upon by the parties. En. March 11, 1872. Am'd. 1873-4, 389; 1880, 115; 1891, 51.

Prac. Act, sec. 433. En. April 29, 1851.

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p. 517 § 2025. Proper interrogatories may be prepared, or may be waived by the parties. Such proper interrogatories, direct and cross, as the respective parties may prepare to be settled if the parties disagree as to their form, by the judge or officer granting the order for the commission, at a day fixed in the order, may be annexed to the commission; or, when the parties agree to that mode, the examination may be without written interrogatories. En. March 11, 1872.

Prac. Act, sec. 434. En. April 29, 1851.

Interrogatories—question and answer in depositions: Ante, sec. 2006.

§ 2025½. On oral interrogatories. When a party shall desire to take the evidence of a nonresident witness, to be used in any cause pending in this state, the party desiring the same (or where notice shall have been given that a commission to take the testimony of a nonresident witness will be applied for, the opposite party, upon giving the other three days' notice in writing of his election so to do), may have a commission directed in the same manner as provided in section two thousand and twenty-four Code of Civil Procedure, to take such evidence, upon interrogatories to be propounded to the witness orally; upon the taking of which each party may appear before the commission, in person or by attorney, and interrogate the witness. The party desiring such testimony shall give to the other the following notice of the time and place of

taking the same, to wit: ten days, and one day in addition thereto (Sundays included) for every three hundred miles' travel from the place of holding the court to the place where such deposition is to be taken.

When a party to a suit shall give the opposite party notice to take a deposition upon oral interrogatories, and shall fail to take the same accordingly, unless such failure be on account of the nonattendance of the witness, not occasioned by the fault of the party giving the notice, or some other unavoidable cause, the party notified, if he shall attend himself or by attorney, agreeably to the notice, shall be entitled to two dollars per day for each day he may attend under such notice, and to six cents per mile for every mile that he shall necessarily travel in going to and returning from the place designated to take the deposition, to be allowed by the court where the suit is pending and for which execution may issue. *En. Stats. 1903, 351.*

§ 2026. **Authorities and duties of commissioner.** The commission must authorize the commissioner to administer an oath to the witness, and to take his deposition in answer to the interrogatories, or when the examination is to be without interrogatories, in respect to the question in dispute, and to certify the deposition to the court, in a sealed envelope, directed to the clerk or other person designated or agreed upon, and forwarded to him by mail or other usual channel of conveyance. *En. March 11, 1872.*

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Prac. Act, sec. 435. En. April 29, 1851.

Certificate: Post, sec. 2032.

§ 2027. **Trial, when postponed for reason of nonreturn of commission.** A trial or other proceeding must not be postponed by reason of a commission not returned, except upon evidence, satisfactory to the court, that the testimony of the witness is necessary, and that proper diligence has been used to obtain it. *En. March 11, 1872.*

Prac. Act, sec. 436. En. April 29, 1851.

§ 2028. **Deposition, by whom used.** The deposition mentioned in this article may be used by either party on the

trial or other proceeding against any other party giving or receiving the notice, subject to all just exceptions. En. March 11, 1872.

Cal. Rep. Cit. 133, 477.

Compare with sec. 2034, post.

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ARTICLE V.

MANNER OF TAKING DEPOSITIONS IN THIS STATE.

- § 2031. Depositions may be taken before a judge, etc., upon notice to the adverse party.
- § 2032. Manner of taking depositions. May be used by either party on the trial.
- § 2033. When deposition excluded.
- § 2034. A deposition once taken may be read at any time.
- § 2035. Deposition in this state to be used in other states.
- § 2036. How to procure witness upon commission.
- § 2037. How, if no commission.
- § 2038. Deposition, how taken.

§ 2031. Depositions may be taken before a judge, etc., upon notice to the adverse party. Either party may have the deposition taken of a witness in this state, in either of the cases mentioned in section two thousand and twenty-one, before a judge or officer authorized to administer oaths, on serving upon the adverse party previous notice of the time and place of examination, together with a copy of an affidavit, showing that the case is within that section. Such notice must be at least five days, adding also one day for every twenty-five miles of the distance of the place of examination from the residence of the person to whom the notice is given, unless, for a cause shown, a judge, by order, prescribed a shorter time. When a shorter time is prescribed, a copy of the order must be served with the notice. En. March 11, 1872.

Cal. Rep. Cit. 66, 391; 140, 8; 140, 13; 140, 220.

Prac. Act, sec. 429. En. April 29, 1851. Am'd. 1859, 218.

Cal. Rep. Cit. 3, 97; 35, 97.

Subpoena issuing to take testimony before notary: Ante, sec. 1986, subd. 2.

§ 2032. Manner of taking depositions. May be used by either party on the trial. Either party may attend the examination and put such questions, direct and cross, as may be proper. The deposition, when completed, must be

carefully read to the witness and corrected by him in any particular, if desired; it must then be subscribed by the witness, certified by the judge or officer taking the deposition, inclosed in an envelope or wrapper, sealed and directed to the clerk of the court in which the action is pending, or to such person as the parties in writing may agree upon, and either delivered by the judge or officer to the clerk or such person, or transmitted through the mail, or by some safe private opportunity; and thereupon such deposition may be used by either party upon the trial or other proceeding against any party giving or receiving the notice, subject to all legal exceptions; but if the parties attend at the examination, no objection to the form of an interrogatory shall be made at the trial, unless the same was stated at the time of the examination. If the deposition be taken under subdivisions two, three, and four, of section two thousand and twenty-one, proof must be made at the trial that the witness continues absent or infirm, or is dead. The deposition thus taken may be also read in case of the death of the witness. En. March 11, 1872.

Cal. Rep. Cit. 63, 370; 74, 47; 74, 48; 117, 49; 121, 152; 125, 114; 129, 24; 133, 477; 140, 8; 140, 13; 140, 220.

Prac. Act, sec. 430. En. April 29, 1851.

Cal. Rep. Cit. 3, 97.

Depositions must be in the form of question and answer, unless otherwise agreed: Ante, sec. 2006.

Notice: Post, sec. 2033.

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§ 2033. When deposition excluded. Notwithstanding the taking of a deposition, it may be excluded from the case upon proof that sufficient notice was not given to the party against whom it is offered to enable him to attend the taking thereof, or that the taking was not in all respects fair. En. March 11, 1872.

Cal. Rep. Cit. 68, 621; 140, 8; 140, 220.

2034
repl'd.
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§ 2034. A deposition once taken may be read at any time. When a deposition has been once taken, it may be read by either party in any stage of the same action or proceeding, or in any other action between the same parties upon the same subject, and is then deemed the evidence of the party reading it. En. March 11, 1872.

Cal. Rep. Cit. 65, 552; 80, 254; 83, 32; 133, 477; 140, 8.

Prac. Act, sec. 431. En. April 29, 1851.

Cal. Rep. Cit. 8, 579.

Reading deposition—in another action: Sec. 2023.

§ 2035. Deposition in this state to be used in other states. Any party to an action or special proceeding in a court, or before a judge, of a sister state, may obtain the testimony of a witness residing in this state, to be used in such action or proceeding, in the cases mentioned in the next two sections. En. March 11, 1872.

§2036 Cal. Rep. Cit. 140, 3.

Am'd.

p. 518 § 2036. How to procure witness upon commission. If a commission to take such testimony has been issued from the court, or a judge thereof, before which such action or proceeding is pending, on producing the commission to a judge of the superior court, with an affidavit satisfactory to him of the materiality of the testimony, he may issue a subpoena to the witness, requiring him to appear and testify before the commissioner named in the commission, at a specified time and place. En. March 11, 1872. Am'd. 1880, 115.

§2037 Cal. Rep. Cit. 140, 3.

Am'd. Subpoena: Ante, secs. 1985 et seq.

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§ 2037. How, if no commission. If a commission has not been issued, and it appear to a judge of the superior court, or to a justice of the peace, by affidavit satisfactory to him:

1, That the testimony of the witness is material to either party.

2. That a commission to take the testimony of such witness has not been issued.

3. That, according to the law of the state where the action or special proceeding is pending, the deposition of a witness taken under such circumstances, and before such judge or justice, will be received in the action or proceeding; he must issue his subpoena requiring the witness to appear and testify before him at a specified time and place. En. March 11, 1872. Am'd. 1880, 115.

Cal. Rep. Cit. 140, 3.

§ 2038. Deposition, how taken. Upon the appearance of the witness, the judge or justice must cause his testimony to be taken in writing, and must certify and trans-

mit the same to the court or judge before whom the action or proceeding is pending, in such manner as the law of that state requires. En. March 11, 1872.

Cal. Rep. Cit. 125, 116; 140, 3.

ARTICLE VI.

GENERAL RULES OF EXAMINATION.

- § 2042. Order of proof, how regulated.
- 2043. Witnesses not under examination may be excluded.
- 2044. Court may control mode of interrogation.
- 2045. Direct and cross-examination defined.
- 2046. Leading question defined.
- 2047. When witness may refresh memory from notes.
- 2048. Cross-examination, as to what.
- 2049. Party producing witness, how far may impeach his credit.
- 2050. Witness, how examined. When re-examined.
- 2051. How impeached.
- 2052. Same.
- 2053. Evidence of good character, when allowed.
- 2054. Writing shown to witness may be inspected by adverse party.

§ 2042. Order of proof, how regulated. The order of proof must be regulated by the sound discretion of the court. Ordinarily, the party beginning the case must exhaust his evidence before the other party begins. En. March 11, 1872.

Cal. Rep. Cit. 94, 130; 123, 408.

Order of proof, reopening case, rebuttal: Ante, sec. 607.

§ 2043. Witnesses not under examination may be excluded. If either party requires it, the judge may exclude from the courtroom any witness of the adverse party, not at the time under examination, so that he may not hear the testimony of other witnesses. En. March 11, 1872.

§ 2044. Court may control mode of interrogation. The court must exercise a reasonable control over the mode of interrogation, so as to make it as rapid, as distinct, as little annoying to the witness, and as effective for the extraction of the truth as may be; but subject to this rule—the parties may put such pertinent and legal questions as they see fit. The court, however, may stop the production of further evidence upon any particular point when

the evidence upon it is already so full as to preclude reasonable doubt. En. March 11, 1872.

Cal. Rep. Cit. 63, 58; 72, 60.

Duty to answer and protection of witness: Post, secs. 2065, 2066.

§ 2045. Direct and cross-examination defined. The examination of a witness by the party producing him is denominated the direct examination; the examination of the same witness, upon the same matter, by the adverse party, the cross-examination. The direct examination must be completed before the cross-examination begins, unless the court otherwise direct. En. March 11, 1872.

§ 2046. Leading question defined. A question which suggests to the witness the answer which the examining party desires, is denominated a leading or suggestive question. On a direct examination, leading questions are not allowed, except in the sound discretion of the court, under special circumstances making it appear that the interests of justice require it. En. March 11, 1872.

Cal. Rep. Cit. 63, 58; 72, 60; 76, 349.

§ 2047. When witness may refresh memory from notes. A witness is allowed to refresh his memory respecting a fact, by anything written by himself or under his direction at the time when the fact occurred or immediately thereafter, or at any other time when the fact was fresh in his memory and he knew that the same was correctly stated in the writing. But in such case, the writing must be produced and may be seen by the adverse party, who may, if he choose, cross-examine the witness upon it, and may read it to the jury. So, also, a witness may testify from such a writing, though he retain no recollection of the particular facts, but such evidence must be received with caution. En. March 11, 1872.

Cal. Rep. Cit. 64, 490; 68, 112; 73, 209; 77, 216; 96, 465; 97, 227; 98, 132; 101, 104; 111, 69; 116, 213; 131, 480; 132, 39; 138, 488.

Inspection of writing shown to witness: Post sec. 2054.

§ 2048. Cross-examination, as to what. The opposite party may cross-examine the witness as to any facts stated in his direct examination or connected therewith, and in

so doing may put leading questions, but if he examine him as to other matters, such examination is to be subject to the same rules as a direct examination. En. March 11, 1872.

Cal. Rep. Cit. 66, 604; 69, 172; 79, 408; 110, 418; 116, 211; 143, 162; 145, 129.

Stopping further testimony: Ante, sec. 2044.

§ 2049. **Party producing witness, how far may impeach his credit.** The party producing a witness is not allowed to impeach his credit by evidence of bad character, but he may contradict him by other evidence, and may also show that he has made at other times statements inconsistent with his present testimony, as provided in section two thousand and fifty-two. En. March 11, 1872.

Cal. Rep. Cit. 68, 586; 68, 588; 69, 172; 80, 161; 111, 623; 118, 675; 134, 619; 141, 532.

§ 2050. **Witness, how examined. When re-examined.** A witness once examined cannot be re-examined as to the same matter without leave of the court, but he may be re-examined as to any new matter upon which he has been examined by the adverse party. And after the examinations on both sides are once concluded, the witness cannot be recalled without leave of the court. Leave is granted or withheld, in the exercise of a sound discretion. En. March 11, 1872.

Cal. Rep. Cit. 94, 512; 105, 319; 141, 246.

Recalling witness—discretion of court: Sec. 607, subd. 3.

§ 2051. **How impeached.** A witness may be impeached by the party against whom he was called, by contradictory evidence, or by evidence that his general reputation for truth, honesty, or integrity is bad, but not by evidence of particular wrongful acts, except that it may be shown by the examination of the witness, or the record of the judgment, that he has been convicted of a felony. En. March 11, 1872.

Cal. Rep. Cit. 48, 338; 50, 234; 50, 235; 51, 600; 57, 573; 57, 574; 58, 214; 60, 413; 64, 163; 65, 134; 65, 551; 65, 625; 68, 103; 70, 229; 71, 196; 75, 388; 76, 196; 79, 673; 81, 105; 81, 117; 86, 490; 87, 114; 96, 180; 99, 442; 100, 482; 108, 607; 113, 87; 113, 624; 116, 687; 118, 110; 118, 111; 119, 271; 121, 669; 123, 358; 124, 657; 125, 134; 125, 135; 125, 136; 133, 20; 134, 204; 134, 307; 134, 356; 134, 492; 142, 294; 143, 127; 146, 122; 147, 786; 147, 787.

Good character, showing after impeachment: Post, sec. 2053.

Falsus in uno falsus in omnibus: Post, sec. 2061.

§ 2052. Same. A witness may also be impeached by evidence that he has made, at other times, statements inconsistent with his present testimony; but before this can be done the statements must be related to him, with the circumstances of times, places, and persons present, and he must be asked whether he made such statements, and if so, allowed to explain them. If the statements be in writing, they must be shown to the witness before any question is put to him concerning them. En. March 11, 1872.

Cal. Rep. Cit. 56, 6; 58, 217; 60, 413; 65, 131; 65, 180; 68, 586; 68, 588; 69, 172; 74, 393; 76, 196; 80, 161; 99, 302; 99, 334; 111, 623; 114, 55; 116, 79; 116, 220; 118, 675; 120, 175; 120, 176; 120, 665; 120, 666; 122, 17; 122, 566; 125, 136; 133, 20; 134, 357; 134, 492; 136, 360; 138, 42; 139, 157; 139, 161; 140, 156; 141, 244; 141, 532; 143, 127; 145, 775; 145, 776.

§ 2053. Evidence of good character, when allowed. Evidence of the good character of a party is not admissible in a civil action, nor of a witness in any action, until the character of such party or witness has been impeached, or unless the issue involves his character. En. March 11, 1872.

§2054 Cal. Rep. Cit. 50, 234; 65, 134; 110, 417.

Am'd.

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§ 2054. Writing shown to witness may be inspected by adverse party. Whenever a writing is shown to a witness, it may be inspected by the opposite party, and if proved by the witness must be read to the jury before his testimony is closed, or it cannot be read except on recalling the witness. En. March 11, 1872.

Cal. Rep. Cit. 62, 145; 140, 204.

Writing to refresh memory: Ante, sec. 2047.

TITLE IV.

OF THE EFFECT OF EVIDENCE.

§ 2061. Jury judges of effect of evidence, but to be instructed on certain points.

§ 2061. Jury judges of effect of evidence, but to be instructed on certain points. The jury, subject to the control of the court, in the cases specified in this code, are the judges of the effect and value of evidence addressed to them, except when it is declared to be conclusive. They are, however, to be instructed by the court on all proper occasions:

1. That their power of judging of the effect of evidence is not arbitrary, but to be exercised with legal discretion, and in subordination to the rules of evidence;

2. That they are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number or against a presumption or other evidence satisfying their minds;

3. That a witness false in one part of his testimony is to be distrusted in others;

4. That the testimony of an accomplice ought to be viewed with distrust, and the evidence of the oral admissions of a party with caution;

5. That in civil cases the affirmative of the issue must be proved, and when the evidence is contradictory the decision must be made according to the preponderance of evidence; that in criminal cases guilt must be established beyond a reasonable doubt;

6. That evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce, and of the other to contradict; and, therefore,

7. That if weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust. En. March 11, 1872.

Cal. Rep. Cit. 50, 633; 60, 148; 66, 185; 67, 403; 71, 397; 76, 196; 79, 692; 80, 603; 84, 456; 96, 181; 105, 523; 111, 14; 115, 12; 115, 14; 125, 519; 141, 231; 141, 232; 141, 233; 141, 613; 143, 393; 144, 254. Subd. 2—122, 179; 142, 655; 144, 36. Subd. 3—53, 355; 53, 494; 69, 238; 73, 515; 84, 583; 119, 507;

121, 163; 126, 4; 131, 233; 134, 184; 138, 45; 138, 698; 141, 492; 143, 127. Subd. 4—95, 297; 98, 279; 111, 13; 119, 332; 121, 670; 131, 258; 143, 391; 144, 253. Subd. 5—55, 404; 56, 603; 65, 530; 80, 584; 84, 33; 134, 488; 136, 414. Subd. 6—120, 563; 122, 591; 122, 592; 144, 63. Subd. 7—122, 591.

Province of jury—questions of fact: Post, sec. 2101.

Credibility of witnesses, jury judges of: Sec. 1847, ante.

Province of court: Compare sec. 608, ante, and sec. 2102, post.

Admissions: Ante, sec. 1870, subd. 2.

TITLE V.

OF THE RIGHTS AND DUTIES OF WITNESSES.

§ 2064. Witnesses bound to attend when subpoenaed.

§ 2065. Witnesses bound to answer questions.

§ 2066. Right of witnesses to protection.

§ 2067. Witnesses protected from arrest when attending, or going or returning.

§ 2068. Arrest to be made void, and party making arrest liable, etc.

Am'd § 2069. To make affidavit if arrested.

p. 519 § 2070. Court to discharge witness from arrest.

§ 2064. Witnesses bound to attend when subpoenaed. A witness, served with a subpoena, must attend at the time appointed, with any papers under his control required by the subpoena, and answer all pertinent and legal questions; and, unless sooner discharged, must remain until the testimony is closed. En. March 11, 1872.

Prac. Act, sec. 407. En. April 29, 1851.

Subpoena: Ante, secs. 1985, 1991.

Answering questions: Post, sec. 2065.

Witnesses—competency, etc.: Ante, secs. 1878-1884.

Examination, impeachment, refreshing memory, etc.: Ante, secs. 2042-2054.

Power to compel attendance: Ante, secs. 128, 177.

Change of place of holding court, effect of: Ante, sec. 143.

Contempt: Ante, secs. 1209 et seq.

§ 2065. Witnesses bound to answer questions. A witness must answer questions legal and pertinent to the

matter in issue, though his answer may establish a claim against himself; but he need not give an answer which will have a tendency to subject him to punishment for a felony; nor need he give an answer which will have a direct tendency to degrade his character, unless it be to the very fact in issue, or to a fact from which the fact in issue would be presumed. But a witness must answer as to the fact of his previous conviction for felony. En. March 11, 1872.

Cal. Rep. Cit. 71, 239; 129, 470; 145, 90.

Prac. Act, sec. 408. En. April 29, 1851.

Cal. Rep. Cit. 3, 249; 7, 185.

Contempt: Ante, secs. 1209 et seq.

§ 2066. Right of witnesses to protection. It is the right of a witness to be protected from irrelevant, improper, or insulting questions, and from harsh or insulting demeanor; to be detained only so long as the interests of justice require it; to be examined only as to matters legal and pertinent to the issue. En. March 11, 1872.

Cal. Rep. Cit. 71, 239; 76, 196; 116, 212; 145, 91.

Compare sec. 2044.

Detention of witness—unreasonable, constitutional prohibition of: See Const. Cal., art. 1, sec. 6.

§ 2067. Witnesses protected from arrest when attending or going or returning. Every person who has been, in good faith, served with a subpoena to attend as a witness before a court, judge, commissioner, referee, or other person, in a case where the disobedience of the witness may be punished as a contempt, is exonerated from arrest in a civil action while going to the place of attendance, necessarily remaining there and returning therefrom. En. March 11, 1872.

Prac. Act, sec. 415. En. April 29, 1851.

§ 2068. Arrest to be made void, and party making arrest liable, etc. The arrest of a witness, contrary to the preceding section, is void, and when willfully made, is a contempt of the court; and the person making it is responsible to the witness arrested for double the amount of the damages which may be assessed against him, and is also liable to an action at the suit of the party serving the wit-

ness with a subpoena, for the damages sustained by him in consequence of the arrest. En. March 11, 1872.

Prac. Act, sec. 416. En. April 29, 1851.

Contempt of court: Ante, secs. 1209 et seq.

§ 2069. To make affidavit if arrested. An officer is not liable to the party for making the arrest in ignorance of the facts creating the exoneration, but is liable for any subsequent detention of the party, if such party claim the exemption and make an affidavit stating;

1. That he has been served with a subpoena to attend as a witness before a court, officer, or other person, specifying the same, the place of attendance, and the action or proceeding in which the subpoena was issued; and,

2. That he has not thus been served by his own procurement, with the intention of avoiding arrest;

3. That he is at the time going to the place of attendance, or returning therefrom, or remaining there in obedience to the subpoena.

The affidavit may be taken by the officer, and exonerates him from liability for discharging the witness when arrested. En. March 11, 1872.

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Am'd. § 2070. Court to discharge witness from arrest. The p. 519 court or officer issuing the subpoena, and the court or officer before whom the attendance is required, may discharge the witness from an arrest made in violation of section two thousand and sixty-seven. If the court have adjourned before the arrest, or before application for the discharge, a judge of the court may grant the discharge. En. March 11, 1872. Am'd. 1880, 116.

TITLE VI.

OF EVIDENCE IN PARTICULAR CASES, AND MISCELLANEOUS AND GENERAL PROVISIONS.

Chapter I. Evidence in Particular Cases, §§ 2074-2079.

II. Proceedings to Perpetuate Testimony, §§ 2083-2089.

III. Administration of Oaths and Affirmations, §§ 2093-2097.

IV. General Provisions, §§ 2101-2104.

CHAPTER I.

EVIDENCE IN PARTICULAR CASES.

- § 2074. An offer equivalent to payment.
- § 2075. Whoever pays entitled to receipt.
- § 2076. Objections to tender must be specified.
- § 2077. Rules for construing description of lands.
- § 2078. Compromise offer of no avail.
- § 2079. In action for divorce, admission not sufficient.

§ 2074. An offer equivalent to payment. An offer in writing to pay a particular sum of money, or to deliver a written instrument or specific personal property, is, if not accepted, equivalent to the actual production and tender of the money, instrument, or property. En. March 11, 1872.

Cal. Rep. Cit. 90, 585; 137, 382.

Offer to compromise: Secs. 997, ante, 2078, post.

Offer of performance: See Civ. Code, secs. 1485 et seq.

§ 2075. Whoever pays entitled to receipt. Whoever pays money, or delivers an instrument or property, is entitled to a receipt therefor from the person to whom the payment or delivery is made, and may demand a proper signature to such receipt as a condition of the payment or delivery. En. March 11, 1872.

Debtor entitled to: Civ. Code, sec. 1499.

§ 2076. Objections to tender must be specified. The person to whom a tender is made, must, at the time,

specify any objection he may have to the money, instrument, or property, or he must be deemed to have waived it; and if the objection be to the amount of money, the terms of the instrument, or the amount or kind of property, he must specify the amount, terms, or kind which he requires, or be precluded from objecting afterward. En. March 11, 1872.

Cal. Rep. Cit. 67, 88; 79, 43; 89, 263; 119, 102; 122, 322; 124, 39; 128, 213; 137, 288; 137, 382; 137, 383.

Objections must be stated: Civ. Code, sec. 1501.

§ 2077. Rules for construing description of lands. The following are the rules for construing the descriptive part of a conveyance of real property, when the construction is doubtful and there are no other sufficient circumstances to determine it:

1. Where there are certain definite and ascertained particulars in the description, the addition of others which are indefinite, unknown, or false, does not frustrate the conveyance, but it is to be construed by the first mentioned particulars.

2. When permanent and visible or ascertained boundaries or monuments are inconsistent with the measurement, either of lines, angles, or surfaces, the boundaries or monuments are paramount.

3. Between different measurements which are inconsistent with each other, that of angles is paramount to that of surfaces, and that of lines paramount to both.

4. When a road, or stream of water not navigable, is the boundary, the rights of the grantor to the middle of the road or the thread of the stream are included in the conveyance, except where the road or thread of the stream is held under another title.

5. When tide-water is the boundary the rights of the grantor to ordinary high-water mark are included in the conveyance. When a navigable lake, where there is no tide, is the boundary, the rights of the grantor to low-water mark, are included in the conveyance.

6. When the description refers to a map, and that reference is inconsistent with other particulars, it controls them if it appear that the parties acted with reference to the map; otherwise, the map is subordinate to other

definite and ascertained particulars. En. March 11, 1872. Am'd. 1873-4, 390.

Cal. Rep. Cit. 108, 185; 141, 447; 141, 450; 141, 456; 143, 96. Subd. 1—66, 86; 135, 321; 141, 452. Subd. 4—69, 206. Subd. 6—69, 206; 141, 452.

Construction of instruments, generally: Secs. 1859, 1860.

§ 2078. **Compromise offer of no avail.** An offer of compromise is not an admission that anything is due. En. March 11, 1872.

Cal. Rep. Cit. 81, 405.

Offer to compromise—after suit brought: Sec. 997.

§ 2079. **In action for divorce, admission not sufficient.** In an action for divorce on the ground of adultery, a confession of adultery, whether in or out of the pleadings, is not of itself sufficient to justify a judgment of divorce. En. March 11, 1872.

CHAPTER II.

PROCEEDINGS TO PERPETUATE TESTIMONY.

- § 2083. Evidence may be perpetuated.
- § 2084. Manner of application for order.
- § 2085. Notice of time and place to be given.
- § 2086. Manner of taking the deposition.
- § 2087. Papers prima facie evidence.
- § 2088. When the evidence may be produced.
- § 2089. Effect of the deposition.

§ 2083. **Evidence may be perpetuated.** The testimony of a witness may be taken and perpetuated as provided in this chapter. En. March 11, 1872.

Prac. Act, sec. 437. En. April 29, 1851. Am'd. 1859, 219.

§ 2084. **Manner of application for order.** The applicant must produce to a judge of the superior court a petition, verified by the oath of the applicant, stating:

1. That the applicant expects to be a party to an action in a court in this state, and, in such case, the names of the persons whom he expects will be adverse parties; or,

2. That the proof of some fact is necessary to perfect the title to property in which he is interested, or to establish marriage, descent, heirship, or any other matter which

may hereafter become material to establish, though no suit may at the time be anticipated, or, if anticipated, he may not know the parties to such suit; and,

3. The name of the witness to be examined, his place of residence, and a general outline of the facts expected to be proved. The judge to whom such petition is presented must make an order allowing the examination, and designating the officer before whom the same must be taken, and prescribing the notice to be given, which notice, if the parties expectant are known and reside in this state, must be personally served, and if unknown, such notice must be served on the clerk of the county where the property to be affected by such evidence is situated, or the judge making the order resides, as may be directed by him, and by publication thereof in some newspaper, to be designated by the judge, for the same period required for the publication of summons. The judge must also designate in his order the clerk of the county to whom the deposition must be returned when taken. En. March 11, 1872. Am'd. 1873-4, 391; 1880, 116.

Prac. Act, sec. 438. En. April 29, 1851. Am'd. 1859, 219.

Cal. Rep. Cit. 37, 275.

§ 2085. Notice of time and place to be given. The person appointed by the judge to take the depositions is authorized, if a resident of this state, on receiving a copy of the order of the judge, and of the notice prescribed in the last section, with proof of its personal service or publication; or, if a resident without the state, on receiving the commission mentioned in the next section, with proof of like service of publication of the notice; to take the deposition of the witness named in the order of the judge, or in the commission, or, if more than one witness is thus named, of such of them as appear before him, at the time designated, and the taking of the same may be continued from time to time. En. March 11, 1872. Am'd. 1873-4, 392.

Prac. Act, sec. 439. En. April 29, 1851. Am'd. 1859, 219.

§ 2086. Manner of taking the deposition. The examination must be by question and answer, and if the testimony is to be taken in another state, it must be taken upon a commission to be issued by the judge allowing the examination, under the seal of the court of which he is judge, and upon interrogatories, to be settled in the same manner as in cases of depositions taken under commission in pending actions, unless the parties expectant, if known, other-

wise agree. If such parties are unknown, notice of the settlement of the interrogatories shall be published in some newspaper for such time as the judge may designate. The deposition, when completed, must be carefully read to and subscribed by the witness, then certified by the officer or person taking the same, and shall then be sealed up and delivered or transmitted to the clerk of the county designated in the order of the judge allowing the examination, who shall file the same when received. The judge allowing the examination shall file with the clerk the order for the examination, the petition on which the same was granted, with proof of service of the order and notice. En. March 11, 1872. Am'd. 1873-4, 392.

Prac. Act, sec. 440. En. April 29, 1851. Am'd. 1859, 219.

§ 2087. *Papers prima facie evidence.* The petition and order and papers filed by the judge as provided in section two thousand and eighty-six, or a certified copy thereof, are prima facie evidence of the facts stated therein to show compliance with the provisions of this chapter. En. March 11, 1872. Am'd. 1873-4, 393.

Prac. Act, sec. 441. En. April 29, 1851. Am'd. 1859, 219.

§ 2088. *When the evidence may be produced.* If a trial be had between the parties named in the petition as parties expectant, or their successors in interest, or between any parties wherein it may be material to establish the facts which such depositions prove, or tend to prove, upon proof of the death or insanity of the witnesses, or that they cannot be found, or are unable, by reason of age or other infirmity, to give their testimony, the depositions or copies thereof may be used by either party, subject to all legal objections; but if the parties attended at the examination, no objection to the form of an interrogatory can be made at the trial, unless the same was stated at the examination. En. March 11, 1872. Am'd. 1873-4, 393.

Prac. Act, sec. 442. En. April 29, 1851. Am'd. 1859, 219.

Cal. Rep. Cit. 3, 128.

§ 2089. *Effect of the deposition.* The deposition so taken and read in evidence has the same effect as the oral testimony of the witness, and no other, and every objection to the witness or to the relevancy of any question put to him, or of any answer given by him, may be made in the same manner as if he were examined orally at the trial. En. March 11, 1872.

CHAPTER III.

ADMINISTRATION OF OATHS AND AFFIRMATIONS.

- § 2093. Judicial and certain officers authorized to administer oaths.
§ 2094. Form of ordinary oath to a witness.
§ 2095. Form may be varied to suit witness' belief.
§ 2096. Same.
§ 2097. Any person who prefers it may declare or affirm.

§ 2093. Judicial and certain officers authorized to administer oaths. Every court, every judge or clerk of any court, every justice and every notary public, and every officer or person authorized to take testimony in any action or proceeding, or to decide upon evidence, has power to administer oaths or affirmations. En. March 11, 1872.

Cal. Rep. Cit. 56, 465; 56, 590; 64, 269; 120, 169; 128, 420.

Prac. Act, sec. 443. En. April 29, 1851.

Cal. Rep. Cit. 3, 97.

Administration of oaths—by whom: Ante, sec. 128, subd. 7; ante, sec. 177, subd. 4; Pol. Code, secs. 1028, 4103, 4118.

§ 2094. Form of ordinary oath to a witness. An oath, or affirmation, in an action or proceeding, may be administered as follows, the person who swears, or affirms, expressing his assent when addressed in the following form: "You do solemnly swear (or affirm, as the case may be) that the evidence you shall give in this issue (or matter) pending between — and —, shall be the truth, the whole truth, and nothing but the truth, so help you God." En. March 11, 1872. Am'd. 1873-4, 393.

Cal. Rep. Cit. 136, 337; 136, 521; 139, 601.

§ 2095. Form may be varied to suit witness' belief. Whenever the court before which a person is offered as a

witness is satisfied that he has a peculiar mode of swearing, connected with, or in addition to the usual form of administration, which, in his opinion, is more solemn or obligatory, the court may, in its discretion, adopt that mode. En. March 11, 1872.

Cal. Rep. Cit. 99, 569.

§ 2096. Same. When a person is sworn who believes in any other than the Christian religion, he may be sworn according to the peculiar ceremonies of his religion, if there be any such. En. March 11, 1872.

Cal. Rep. Cit. 99, 569.

Prac. Act, sec. 444. En. April 29, 1851.

§ 2097. Any person who prefers it may declare or affirm. Any person who desires it may, at his option, instead of taking an oath, make his solemn affirmation or declaration, by assenting, when addressed in the following form: "You do solemnly affirm (or declare) that," etc., as in section two thousand and ninety-four. En. March 11, 1872.

Prac. Act, sec. 445. En. April 29, 1851.

CHAPTER IV.

GENERAL PROVISIONS.

- § 2101. Questions of fact, how tried.
- § 2102. Questions of law addressed to the court.
- § 2103. Questions of fact by court or referee.
- § 2104. Moneys paid into court.

§ 2101. Questions of fact, how tried. All questions of fact, where the trial is by jury, other than those mentioned in the next section, are to be decided by the jury, and all evidence thereon is to be addressed to them, except when otherwise provided by this code. En. March 11, 1872. Am'd. 1873-4, 394.

Effect of evidence, for jury: Ante, sec. 2061.

Fraudulent intent, a question of fact: Civ. Code, sec. 3442.

§ 2102. Questions of law addressed to the court. All questions of law, including the admissibility of testimony,

the facts preliminary to such admission, and the construction of statutes and other writings, and other rules of evidence, are to be decided by the court, and all discussions of law addressed to it. Whenever the knowledge of the court is, by this code, made evidence of a fact, the court is to declare such knowledge to the jury, who are bound to accept it. En. March 11, 1872.

Cal. Rep. Cit. 113, 625.

Knowledge of the court—Scope of judicial notice: Ante, sec. 1875.

§ 2103. Questions of fact by court or referee. The provisions contained in this part of the code respecting the evidence on a trial before a jury, are equally applicable on the trial of a question of fact before a court, referee, or other officer. En. March 11, 1872.

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§ 2104. Moneys paid into court. Whenever moneys are paid into or deposited in court, the same shall be delivered to the clerk in person, or to such of his deputies as shall be specially authorized by his appointment in writing to receive the same. He must, unless otherwise directed by law, deposit it with the county treasurer, to be held by him subject to the order of the court. The treasurer shall keep each fund distinct, and open an account with each. Such appointment shall be filed with the county treasurer, who shall exhibit it, and give to each person applying for the same a certified copy of the same. It shall be in force until a revocation in writing is filed with the county treasurer, who shall thereupon write "revoked," in ink across the face of the appointment. En. Stats. 1873-4, 394.

Cal. Rep. Cit. 51, 110; 56, 306; 73, 269; 133, 532.

Corresponding provision: Ante, sec. 573.

The foregoing new section, and many of the foregoing amendments to the Code of Civil Procedure, are taken from "An act to amend the Code of Civil Procedure," approved March 24, 1874; amendments 1873-4, 279. The amendatory act contained two other sections, in reference to the effect of the new provisions, as follows:

Repealing clause—Rights preserved.

Sec. 253. All provisions of law inconsistent with the provisions of this act are hereby repealed; but no rights acquired, or proceedings taken under, the provisions re-

pealed shall be impaired, or in any manner affected by this repeal; and whenever a limitation or period of time prescribed by such repealed provisions for acquiring a right or barring a remedy, or for any other pupose, has begun to run before this act takes effect, and the same or any other limitation is prescribed by this act, the time which shall have run when this act takes effect shall be deemed part of the time prescribed by this act.

Sec. 254. This act takes effect on the first day of July, eighteen hundred and seventy-four.

APPENDIX.

APPEALS.

An act to provide for the taking of appeals from judgments or orders given or made in the courts existing on and before the first day of January, eighteen hundred and eighty. [Approved April 3, 1880, Stats. 1880, p. 24 (Ban. ed., p. 121).]

The purpose of the act sufficiently appears from the title.

BONDS.

An act to facilitate the giving of bonds required by law.

- § 1. Incorporations for giving bonds.
- § 2. When corporation not accepted.
- § 3. Duty of insurance commissioner.

Incorporations for giving bonds.

Section 1. Whenever any person who now or hereafter may be required or permitted by law to make, execute, and give a bond or undertaking, with one or more sureties, conditioned for the faithful performance of any duty, or for the doing or not doing of anything in said bond or undertaking specified, any head of department, board, court, judge, officer, or other person who is now or shall hereafter be required to approve the sufficiency of any such bond or undertaking, or the sureties thereon, may accept as sole and sufficient surety on such bond or undertaking any corporation incorporated under the laws of any state of the United States for the purpose of making or guaranteeing bonds and undertakings required by law, and which shall have complied with all the requirements of the laws of this state regulating the admission of such corporation to transact such business in this state; and all such corporations are hereby vested with full power and authority

to make and guarantee such bonds and undertakings, and shall be subject to all the liabilities and entitled to all the rights of natural persons sureties.

When corporation not accepted.

Sec. 2. It is further provided that the guaranty of any such company shall not be accepted by heads of departments or others, as provided in section one of this act, whenever its liabilities shall exceed its assets, as ascertained in the manner provided in section three of this act.

Duty of insurance commissioner.

Sec. 3. Whenever the liabilities of any such company shall exceed its assets, the insurance commissioner shall require the deficiency to be paid up within sixty days, and if it is not so paid up, then he shall issue a certificate showing the extent of such deficiency, and he shall publish the same once a week for three weeks in a daily San Francisco paper, and thenceforth, and until such deficiency is paid up, such company shall not do business under the provisions of this act. And in estimating the condition of any such company, under the provisions of this act, the commissioner shall allow as assets only such as are authorized under existing laws at the time, and shall charge as liabilities, in addition to eighty per cent of the capital stock, all outstanding indebtedness of the company, and a premium reserve equal to fifty per centum of the premiums charged by said company on all risks then in force. Nothing herein contained shall apply to bonds given in criminal cases.

Sec. 4. This act shall take effect immediately. [Approved March 12, 1885; 1885, 114.]

COSTS.

An act concerning the costs in civil actions for serving summonses and subpoenas.

Section 1. In all civil actions, when a summons or subpoena is served by a person other than the sheriff, the person so serving shall be allowed by the court issuing the process such sum as the court may think proper, not exceeding the amount allowed sheriffs by law.

Sec. 2. This act shall take effect from and after its passage. [Approved March 10, 1891; Stats. 1891, p. 56.]

Act concerning costs in actions of libel and slander: See post, title Libel.

COURTS.

Supreme court commission was created originally by the act of March 12, 1885. It consisted of three members to hold for four years. In 1889 the commission was enlarged to five members to hold for two years. The commission has been re-created by act of the legislature every two years since that time.

The commission was continued by the act of March 18, 1903: Stats. 1903, ch. 161.

An act to provide that in all cities of over ten thousand inhabitants, the mayor, or other chief executive, shall not be required to act as city judge, or ex officio judge of the city court, or as justice of the peace; to provide for the abolishment of such city court, and for the transfer of the business and properties of said city court to the justice of the peace of such cities, and to require such justice to finish such business, and to repeal all special acts in conflict herewith.

§ 1. Duties of mayor.

§ 2. Transfer of books, etc., to justice.

Duties of mayor.

Section 1. In cities of over ten thousand inhabitants, the mayor, or other chief executive thereof, shall not be required to act as justice of the peace, or to hold a city court, or to act as ex officio city judge, or to perform any of the duties of judge of the city courts; and all city courts created by law to be held by such mayor, or other chief executive of such cities, are hereby abolished.

Transfer of books, etc., to justice of the peace.

Sec. 2. All books, dockets, files, documents, papers, and properties of every kind whatsoever belonging to such city court, shall be transferred to the justice of the peace of said city, provided for by law, to hold the police court of such city, or if there be no such police court therein,

then to such justice of the peace therein as may be designated for such purpose by the mayor thereof; and such justice of the peace shall have jurisdiction of all matters heretofore brought in such city court, or of which said city court had jurisdiction; and it shall be his duty to collect all fines and charges required by law to be collected by such city court, and to account for and pay the same over to the treasurer of said city in the same manner, and at the same times and under such terms and conditions, as heretofore required of and by said city court. Said justice of the peace shall complete all such unfinished business as may be transferred to him from said city court under the provisions hereof, in the same manner as heretofore required of said city court.

Sec. 3. The provisions of all acts and every special act of the legislature which conflict in any wise with this act are each and every one hereby repealed.

Sec. 4. This act shall take effect and be in force at once after its passage. [Approved March 8, 1887; Stats. 1887, 51.]

An act to confer upon the superior court of each county, and the judge thereof, the powers heretofore possessed by the district, county, and probate courts of such county, and the judges thereof. [Approved April 3, 1880; Stats. 1880, p. 23 (Ban. ed., 115).]

The object of this act sufficiently appears from its title.

An act authorizing the judges of the superior court in all counties, and cities and counties, having a population of two hundred thousand inhabitants and over, to appoint a secretary.

Section 1. In all counties, and cities and counties, having a population of two hundred thousand inhabitants and over, the judges of the superior court in such counties, and cities and counties, may appoint a secretary, who shall receive a salary of one hundred and fifty (\$150) dollars per month, and hold office at their pleasure, and shall perform such duties as may be required of him by the court or the judges thereof. Said salary shall be audited, allowed, and paid out of the general fund of such counties, and cities and counties.

Sec. 2. This act shall take effect from and after its passage. [Approved March 26, 1895; Stats. 1895, 98.]

An act to provide one additional judge of the superior court of the county of Alameda. [Approved February 13, 1893; Stats. 1893, 3.]

An act to provide one additional judge of the superior court of the county of Alameda. [Approved March 14, 1901; Stats. 1901, 295.]

This act increased the number of judges from four to five.

An act to increase the number of judges of the superior court of the county of Fresno, state of California, and for the appointment of an additional judge. [Approved March 8, 1887; Stats. 1887, p. 57.]

An act to facilitate the disposition of business in the superior court of Fresno County, by the appointment and election of a third judge of said court. [Act approved March 10, 1893; Stats. 1893, p. 125.]

An act to reduce the number of judges of the superior court of the county of Fresno from three to two. [Approved March 26, 1895; Stats. 1895, p. 156.]

An act to provide for the appointment and election of one additional judge for the county of Humboldt. [Approved March 8, 1895; Stats. 1895, p. 27.]

An act to increase the number of judges of the superior court of the county of Los Angeles, state of California, and for the appointment of such additional judges. [Approved March 11, 1889; Stats. 1889, p. 130.]

This act increased the number of judges in Los Angeles County from four to six.

In 1887 the legislature increased the number of judges in Los Angeles from two to four. [Stats. 1887, p. 7.]

An act to provide an additional judge of the superior court for the county of Mono. [Stats. 1880, p. 99.]

This act was repealed March 9, 1883. [Stats. 1883, p. 62.]

An act to provide one additional judge of the superior court of Mono County. [Approved February 17, 1903; Stats. 1903, ch. 28.]

An act to provide one additional judge of the superior court of the county of Sacramento. [Approved March 12, 1895; Stats. 1895, p. 48.]

An act to provide an additional judge of the superior court of the county of San Bernardino. [Approved March 5, 1887; Stats. 1887, p. 19.]

An act to increase the number of judges of the superior court of the county of San Diego, state of California, and for the appointment of such additional judges. [Approved February 8, 1889; Stats. 1889, p. 5.]

This act increased the number of judges from one to three. The act of March 5, 1895, (Stats. 1895, p. 24); afterwards reduced the number of judges to two.

An act providing for an additional superior judge for the county of San Luis Obispo, and providing for his appointment and salary. [Approved February 8, 1889; Stats. 1889, p. 6.]

This act increased the number of judges from one to two. By the act of 1889, p. 333, approved March 19, 1889, the number was reduced to one.

An act to increase the number of judges of the superior court of the county of Santa Clara, and to provide for the appointment of an additional judge. [Approved February 16, 1897; Stats. 1897, p. 7. In effect immediately.]

This act increased the number of judges from one to two.

An act providing for the election or appointment of a separate judge of the superior court for each of the counties of Yuba and Sutter, and fixing and providing for the payment of the salary of each of such judges. [Approved March 2, 1897; Stats. 1897, p. 48.]

A bill to increase the number of judges of the superior court of the county of Tulare, and to provide for the appointment of an additional judge. [Approved March 10, 1891; Stats. 1891, p. 61.]

This act increased the number of judges from one to two. Afterwards, by the act of March 26, 1895, the number was reduced to one. [Stats. 1895, p. 128.]

ESTATES OF DECEASED PERSONS.

- § 1. Right to collect deposit.
§ 2. Power of bank.

An act to amend an act entitled "An act to authorize the husband or wife, or next of kin, of a deceased person, to collect and receive of any savings bank any deposit in such bank when the same does not exceed the sum of three hundred dollars," approved February 18, 1874. [Stats. 1895, 32.]

Section 1. Section one of said act is hereby amended so as to read as follows:

Section 1. The surviving husband or wife of any deceased person, or if no husband or wife be living, then the next of kin of such decedent, may, without procuring letters of administration, collect of any bank any sum which said deceased may have left on deposit in such bank at the time of his or her death; provided, said deposit shall not exceed the sum of five hundred dollars.

Sec. 2. Section two of said act is hereby amended so as to read as follows:

Section 2. Any bank, upon receiving an affidavit stating that said depositor is dead, and that affiant is the surviving husband or wife, as the case may be, or stating that said decedent left no husband or wife, and that affiant is next of kin of said decedent, and entitled to distribution, and that the whole amount that decedent left on deposit in any and all banks of deposit in this state does not exceed the sum of five hundred dollars, may pay to said affiant any deposit of said decedent, if the same does not exceed the sum of five hundred dollars, and the receipt of such affiant shall be a sufficient acquittance therefor.

Sec. 3. Any person who shall make a false affidavit in regard to the matters specified in this act, shall be deemed to be guilty of perjury.

Sec. 4. This act shall take effect from and after its passage.

[Became a law, under constitutional provision, without governor's approval, March 8, 1895. The original act was the same except that the amount was \$300.]

An act supplementary to an act entitled an act to regulate the settlement of the estates of deceased persons, passed May first, eighteen hundred and fifty-one.

Section 1. When it shall appear, upon the settlement of the accounts of any executor or administrator, that debts against the deceased have been paid without the affidavit and allowance prescribed by section one hundred and thirty-one of the act to which this act is supplementary, and it shall be proven by competent evidence to the satisfaction of the probate courts that such debts were justly due, were paid in good faith, that the amount paid was the true amount of such indebtedness over and above all payments of set-offs, and that the estate is solvent, it shall be the duty of the said court to allow the said sums so paid in the settlement of said accounts.

Sec. 2. This act shall go into effect from and after its passage. [Approved March 30, 1872; 1871-2, 696.]

This act was superseded by section 1632 of the Code of Civil Procedure, ante.

An act authorizing certain corporations to act as executor and in other capacities, and to provide for and regulate the administration of trusts by such corporations.

[Approved April 6, 1891; Stats. 1891, p. 490; amended 1897, p. 424.]

- § 1. What corporations may act as executor.
2. Deposits made with corporation.
3. Public administrator may make deposits.
4. Court may order deposit and reduce bonds.
5. Responsible for investments.
6. Interest.
7. Deposit of bonds with state treasurer.
8. May mortgage real estate.
9. Deposit, increase, and decrease of.
10. Abstracts of title.
11. Certificate of authority.
12. Semi-annual statement.
13. Verification of statement.
14. Duty of bank commissioners.
15. No section.
16. Administering oaths and examining witnesses.
17. Duty when corporation violates law.
18. False statement revokes authority.
19. Retirement from business.

Section 1. Any corporation which has or shall be incorporated under the general incorporation laws of this

state, authorized by its articles of incorporation to act as executor, administrator, guardian, assignee, receiver, depository, or trustee, and having a paid-up capital of not less than two hundred and fifty thousand dollars, of which one hundred thousand dollars shall have been actually paid in, in cash, may be appointed to act in such capacity in like manner as individuals. In all cases in which it is required that an executor, administrator, guardian, assignee, receiver, depository, or trustee, shall qualify by taking and subscribing an oath, or in which an affidavit is required, it shall be a sufficient qualification by such corporation if such oath shall be taken and subscribed or such affidavit made by the president or secretary or manager thereof, and such officer shall be liable for the failure of such corporation to perform any of the duties required by law to be performed by individuals acting in like capacity and subject to like penalties; and such corporation shall be liable for such failure to the full amount of its capital stock; provided, any such appointment as guardian shall apply to the estate only, and not to the person. Such corporations shall be entitled to and shall be allowed proper compensation for all the services performed by them under the foregoing provisions of this act; but such compensation shall not exceed that allowed to natural persons for like services.

Sec. 2. Any court, having appointed and having jurisdiction of any executor, administrator, guardian, assignee, receiver, depository, or trustee, upon the application of such officer or trustee, or upon the application of any person having an interest in the estate administered by such officer or trustee, after notice to the other parties in interest, as the court may direct, and after a hearing upon such application, may order such officer or trustee to deposit any moneys then in his hands, or which may come into his hands thereafter, and until the further order of said court, with any such corporation, and upon deposit of such money and its receipt and acceptance by such corporation the said officer or trustee shall be discharged from further care or responsibility therefor. Such deposits shall be paid out only upon the orders of said court.

Sec. 3. And it shall be lawful for any public administrator to deposit with any such corporation doing business

in the county or city and county, in which he is acting as such administrator any and all moneys of any estate upon which he is administering, not required for the current expenses of the administration. And such deposits shall relieve the public administrator from depositing with the county treasurer the moneys so deposited with such corporation. Moneys deposited by a public administrator may be drawn upon the order of such administrator, countersigned by a judge of a superior court, when required for the purpose of administration or otherwise.

Sec. 4. Whenever, in the judgment of any court having jurisdiction of any estate in process of administration by any executor, administrator, guardian, assignee, receiver, depository, or trustee, the bond required by law of such officer shall seem burdensome or excessive, upon application of such officer or trustee, and after such notice to the parties in interest, as the court shall direct, and after a hearing on such application, the said court may order the said officer or trustee to deposit with any such corporation, for safe keeping, such portion or all of the personal assets of said estate as it shall deem proper; and thereupon said court shall, by an order of record, reduce the bond to be given or theretofore given by such officer or trustee, so as to cover only the estate remaining in the hands of said officer or trustee; and the property as deposited shall thereupon be held by said corporation, under the orders and directions of said court. Any court having jurisdiction of an estate being administered by a public administrator may direct such public administrator to deposit all or any part of the moneys of the estate not required for the current expenses of the administration, with any such corporation doing business in the county or city and county where such public administrator is acting.

Sec. 5. Such corporations shall not be required to give any bond or security in case of any appointment hereinbefore provided for, except as hereinafter provided, but shall be responsible for all investments which shall be made by it of the funds which may be intrusted to it for investment by such court, and shall be further liable as natural persons in like positions now are, and as hereinafter provided. The amount of money which any such corporation shall have on deposit at any time shall not

exceed ten times the amount of its paid-up capital and surplus, and its outstanding loans shall not at any time exceed said amount.

Sec. 6. Such corporations shall pay interest upon all moneys held by them by virtue of this act, at such rate as may be agreed upon at the time of its acceptance of any such appointment, or as shall be provided by the order of the court.

Sec. 7. Each corporation, before accepting any such appointment or deposit, shall deposit with the treasurer of state, for the benefit of the creditors of said corporation, the sum of one hundred thousand dollars (\$100,000.00), in bonds of the United States, or municipal bonds of this state, or of any county, or city, or school district thereof, or in mortgages on improved and productive real estate in this state, being first liens thereon, and the real estate being worth at least twice the amount loaned thereon. The bonds and securities so deposited may be exchanged from time to time for other securities, receivable as aforesaid. Said bonds of the United States, or municipal bonds of this state, or of any county, city, or school district thereof, to be registered in the name of said treasurer, officially, and all said securities to be subject to sale and transfer, and to the disposal of the proceeds by said treasurer, only on the order of a court of competent jurisdiction, and as hereinafter provided. [Amendment, approved April 1, 1897; Stats. 1897, p. 424.]

Sec. 8. Any such corporation, having a paid-up capital in excess of two hundred and fifty thousand dollars, may be permitted by the board of bank commissioners to mortgage any improved and productive real estate owned by it, in excess of said amount, to the treasurer of state, for such sum as the said board may determine; and such mortgage may be deposited with said treasurer, and, when so deposited, it shall be included in the amount of securities, hereinabove required to be deposited with said treasurer for the benefit of the creditors of said corporation.

Sec. 9. So long as the corporation so depositing shall continue solvent, such corporation shall be permitted to receive from said treasurer the interest or dividends on said deposit; provided, however, that when it shall appear to the board of bank commissioners, from the semi-annual

report of any such corporation, that the value of the personal property and cash held and possessed by such corporation, by virtue of the provisions of this act and any amendment thereof, exceeds ten times the amount of the deposit aforesaid, said board shall require said corporation to forthwith increase its said deposit to the sum of five hundred thousand dollars in such securities. And whenever it shall appear to said board that the amount of personal property and cash so held by any such corporation has been reduced below ten times the value of its original deposit above provided for, and said corporation is not in any default in its duties and obligations hereunder, they shall allow such corporation to reduce its said deposit to the sum of two hundred thousand dollars, by the withdrawal of such additional deposit, until such time as an increase in its holdings shall again require an additional deposit, as hereinbefore provided.

Sec. 10. When any part of such deposit is made in bonds and mortgages, it shall be accompanied by full abstracts of titles and searches, and shall be examined and approved by or under the direction of the said board. The fees for an examination of title by counsel, to be paid by the corporation making the deposit, shall not exceed twenty dollars for each mortgage, and the fee for each appraiser, not exceeding two, besides expenses, shall be five dollars for each mortgage.

Sec. 11. It shall not be lawful for any such corporation to accept any trust or deposit, as hereinbefore provided, after the passage of this act without first procuring from the board of bank commissioners a certificate of authority, stating that such corporation has complied with the requirements of this act in respect to such deposit.

Sec. 12. Such corporation shall file with the said board of bank commissioners, during the months of January and July of each year, a statement, under oath, of the condition of such corporation at the close of business on the thirty-first day of December and the thirtieth day of June, respectively, next preceding, showing its financial condition. Also, a list and brief description of the trusts held by such corporation, the source of the appointment thereto, and the amount of real and personal estate held by such corporation by virtue thereof, except that mere mortgage trusts,

wherein no action has been taken by such corporation, shall not be included in such statement. The said statement shall also be in such form, and contain such reports, returns, and information, as to the affairs, business, condition, and resources of the corporation, as the said board may from time to time prescribe and require.

Sec. 13. Such statement shall be verified by the affidavit of one of the managing officers and two of the directors or trustees of such corporation, who shall also state in such affidavit that they have examined the assets and books of such corporation for the purpose of making such statement. Any false swearing in regard to such statement shall be deemed perjury, and shall be subject to the punishment prescribed by law for such offense.

Sec. 14. The said board of bank commissioners are hereby authorized and empowered to address any inquiries to any such corporation, or the officers thereof, in relation to its doings and conditions, or any other matter connected with its affairs; and it shall be the duty of any such corporation or person so addressed to promptly reply, in writing, to such inquiries; and they may also require reports from any such corporation at any time they may deem desirable. It shall be the duty of one or more of the bank commissioners, as designated by the commissioners, annually, or as often as in their judgment they may deem it necessary, without previous notice, to visit and to make personal examination of the solvency of any such corporation, its ability to fulfill all its obligations, and report its condition to the attorney-general as soon as may be after such examination.

Sec. 16. Such commissioners shall have power to administer an oath to any person whose testimony may be required on any such examination, and to compel the appearance and attendance of any such person, for the purpose of examination, by summons, subpoena, or attachment, in the manner now authorized in respect to the attendance of persons as witnesses in courts of record in this state; and all books and papers which may be deemed necessary to examine by the commissioners shall be produced, and their production may be compelled in like manner.

Sec. 17. Whenever it shall appear to the board of bank commissioners, from any such examination or report, that

any such corporation has committed any violation of law, or is conducting its business in an unsafe or unauthorized manner, they shall, by an order under their hands, direct the discontinuance of such illegal and unsafe or unauthorized practice, and strict conformity with the requirements of the law, and with safety and security in its transactions; and whenever any such corporation shall refuse or neglect to make any such report as hereinbefore required or to comply with any such order as aforesaid, or whenever it shall appear to the said board that it is unsafe or inexpedient for any such corporation to continue to transact business, they shall communicate the facts to the attorney-general, who shall thereupon institute such proceedings against the corporation as the nature of the case may require.

Sec. 18. If the board of bank commissioners shall at any time have satisfactory evidence that any semi-annual statement or other report required or authorized by this act, made or to be made by any officer or officers of such corporation, is false, it shall be the duty of the said board to immediately revoke the certificate of authority granted on behalf of such corporation and mail a copy of such revocation to said corporation and to the clerk of every court of record in this state. Such revocation shall not be set aside until satisfactory evidence shall be given to said board of bank commissioners that such corporation is in substance and in fact in the condition set forth in such statement or report, and that all the requirements of this act have been complied with. Such revocation shall be sufficient cause for the removal of such corporation from any appointment held by it under the provisions of this act.

Sec. 19. Any corporation which desires to retire from business under this act shall furnish to the board of bank commissioners satisfactory evidence of its release and discharge from all the obligations and trusts hereinbefore provided for; whereupon they shall revoke their certificate to such corporation, and thereupon the treasurer of state shall return to said corporation all its securities.

Sec. 20. All laws and parts of laws in conflict with the provisions of this act are hereby repealed.

Sec. 21. This act shall take effect and be in force from and after its passage.

INTERPRETERS.

An act to authorize the appointment of an interpreter of the Italian language and dialects, in criminal proceedings, in cities, and cities and counties, of one hundred thousand inhabitants.

- § 1. Appointment of interpreter.
- § 2. Salary.
- § 3. Repeal.

Section 1. In all cities and cities and counties of over one hundred thousand inhabitants, where an interpreter of the Italian language is necessary, it shall be the duty of the mayor and police judge of such city, or city and county, and of the judge of the superior court of said city and county, or of the county in which said city is situated, or where there are more judges than one, then it shall be the duty of the presiding judge of said superior court, and the presiding judge of the police court and the mayor, to appoint an interpreter of the Italian language, who must be able to interpret the Italian language and dialects into the English language, to be employed in criminal proceedings when necessary in said cities, or cities and counties. [Amendment approved March 9, 1895; Stats. 1895, p. 37.]

Sec. 2. The said interpreter shall receive a salary of one thousand five hundred dollars per annum, which shall be paid out of the general fund of such city, or city and county.

Sec. 3. This act shall not repeal any act heretofore made and now in force for the appointment of interpreters, except so much of any act which may conflict with this act in the appointment of Italian interpreters.

Sec. 4. This act shall take effect and be in force from and after its passage. [Approved March 12, 1885; Stats. 1885, 108; amended 1895, p. 37.]

Superseded as to San Francisco by chapter I of article V of the charter of that city.

JUSTICES' CLERK.

An act relating to the justices' courts in cities and counties of more than two hundred thousand population, and providing for the appointment of a justices' clerk and his assistants, prescribing their duties and fixing their compensation.

[Approved March 25, 1903; Stats. 1903, ch. 360. In effect immediately.]

The people of the state of California, represented in senate and assembly, do enact as follows:

Section 1. The supervisors in every city and county of more than two hundred thousand population shall appoint a justices' clerk upon the written nomination and recommendation of the justices of the peace of said city and county or a majority of them, who shall hold office for four years and until his successor is in like manner appointed and qualified.

Sec. 2. Said justices' clerk shall take the constitutional oath of office, and give bond in the sum of ten thousand dollars for the faithful discharge of the duties of his office, and in the same manner as is or may be required of other officers of such city and county. A new and additional bond may be required by the supervisors of such city and county, whenever they may deem it necessary.

Sec. 3. The justices' clerk shall have authority to appoint one cashier, one chief deputy clerk, two deputy clerks and one messenger, for whose acts he shall be responsible on his official bond. The said appointees to hold office during the pleasure of said justices' clerk.

Sec. 4. Said chief deputy clerk and said deputy clerks shall have authority to administer oaths, and take and certify affidavits in any action, suit or proceeding in the justices' courts in such city and county and generally to perform all acts which the justices' clerk himself might perform.

Sec. 5. Said justices' clerk and his appointees shall receive for their official services the following salaries and no other or further compensation, payable out of the treasury of such city and county, after being allowed and audited as other similar demands are required by law to

be allowed and audited: The said justices' clerk the sum of three thousand dollars per annum; the cashier and the chief deputy clerk each the sum of eighteen hundred dollars per annum; the deputy clerks fifteen hundred dollars per annum each; and the messenger twelve hundred dollars per annum.

Sec. 6. The said justices, justices' clerk and his said appointees shall be in attendance at their respective offices for the dispatch of official business, daily, except Sundays and holidays, from the hour of nine o'clock A. M. until five o'clock P. M.

Sec. 7. In all actions, suits, and proceedings commenced in the justices' court in such city and county, or before any of the justices of the peace thereof, the original process shall be returnable, and the parties summoned required to appear before one of the justices of the peace, to be designated by the justices' clerk, upon issuing such process.

Sec. 8. All legal process of every kind in actions, suits or proceedings in said justices' court shall be issued by the said justices' clerk.

Sec. 9. All other acts so far as they conflict with this act are hereby repealed.

Sec. 10. This act shall take effect immediately.

JUSTICES OF THE PEACE.

An act fixing jurisdiction and providing compensation for justices of the peace in cities and towns.

§ 1. Powers of justice of the peace.

§ 2. Compensation.

Powers of justices of the peace.

Section 1. Justices of the peace in any township composed in whole or in part of an incorporated city or town, and justices of the peace in any city or town, in addition to the jurisdiction and powers now conferred upon them, are authorized and empowered to exercise all powers, duties, and jurisdiction, civil and criminal, of police judges, judges of police courts, recorders' courts, or mayors' courts within such cities.

Compensation.

Sec. 2. The compensation of the justice of the peace of any city or town, who is paid by salary, shall be by warrants for equal monthly payments, drawn each month upon the salary fund of such city or town if there be one; or if no salary fund be provided, then upon the general fund of such city or town, such warrants to be audited and paid as are salaries of other city officials.

Sec. 3. This act shall take effect immediately. [Approved March 9, 1883; Stats. 1883, 63.]

Superseded by Code of Civil Procedure, section 103, ante, as amended in 1901 and 1903.

An act concerning the justices' courts of the city and county of San Francisco, and the service of summons issued therefrom.

Summons.

Section 1. The summons issued from the justices' courts may be served and returned as provided in title five, part two, of the Code of Civil Procedure.

Sec. 2. This act shall take effect from and after its passage. [Approved April 3, 1876; 1875-6, 855.]

Superseded by Code of Civil Procedure, section 849.

An act to create a court in and for the town of Berkeley, state of California. [Approved March 27, 1895; Stats. 1895, p. 205. Declared unconstitutional by *Miner v. Justices' Court*, 121 Cal. 264.]

LIBEL.

An act concerning actions for libel and slander.

1. Undertaking.
2. Sureties.
3. Exception to sureties.
4. Justification.
5. Approval—New mortgage.
6. Failure to file bond.
7. Costs.

Section 1. In an action for libel or slander the clerk shall, before issuing the summons therein, require a written undertaking on the part of the plaintiff in the sum of five hundred (500) dollars, with at least two competent and

sufficient sureties, specifying their occupations and residences, to the effect that if the action be dismissed or the defendant recover judgment, that they will pay such costs and charges as may be awarded against the plaintiff by judgment, or in the progress of the action, or on an appeal, not exceeding the sum specified in the undertaking. An action brought without filing the undertaking required shall be dismissed.

Sec. 2. Each of the sureties on the undertaking mentioned in the first section shall annex to the same an affidavit that he is a resident and householder or freeholder within the county, and is worth double the amount specified in the undertaking, over and above all his just debts and liabilities, exclusive of property exempt from execution.

Sec. 3. Within ten days after the service of the summons the defendants, or either of them, may give to the plaintiff or his attorney notice that they or he except to the sureties and require their justification before a judge of the court at a specified time and place, the time to be not less than five nor more than ten days thereafter, except by consent of parties. The qualifications of the sureties shall be as required in their affidavits. [Amendment approved April 16, 1880; Stats. 1880, p. 81.]

Sec. 4. For the purpose of justification, each of the sureties shall attend before the judge at the time and place mentioned in the notice, and may be examined on oath touching his sufficiency in such manner as the judge in his discretion shall think proper. The examination shall be reduced to writing if either party desires it.

Sec. 5. If the judge find the undertaking sufficient, he shall annex the examination to the undertaking, and indorse his approval thereon. If the sureties fail to appear, or the judge finds the sureties or either of them insufficient, he shall order a new undertaking to be given. The judge may also at any time order a new or additional undertaking upon proof that the sureties have become insufficient. In case a new or additional undertaking is ordered, all proceedings in the case shall be stayed until such undertaking is executed and filed, with the approval of the judge.

Sec. 6. If the undertaking as required be not filed in five days after the order therefor, the judge or court shall order the action to be dismissed.

Sec. 7. In case plaintiff recovers judgment, he shall be allowed as costs one hundred (100) dollars, to cover counsel fees, in addition to the other costs. In case the action is dismissed, or the defendant recover judgment, he shall be allowed one hundred (100) dollars, to cover counsel fees, in addition to the other costs, and judgment therefor shall be entered accordingly. [Approved March 23, 1872; Stats. 1871-2, p. 533; amended 1880, p. 81.]

MORTGAGES.

An act to abolish attorney's fees and other charges in foreclosure suits.

Attorney's fee on foreclosure to be fixed by court.

Section 1. In all cases of foreclosure of mortgage the attorney's fee shall be fixed by the court in which the proceedings of foreclosure are had, any stipulation in said mortgage to the contrary notwithstanding.

Sec. 2. All acts and parts of acts, so far as they conflict with the provisions of this act, are hereby repealed, and this act shall take effect and be in force from and after its passage. [Approved March 27, 1874; Stats. 1873-4, 707.]

PROCESS.

An act concerning the execution of final process in certain cases.

Service of final process in new counties.

Section 1. In all cases where new counties have been or may hereafter be erected, and executions, orders of sale upon foreclosures of mortgages, or other process affecting specific real estate, have been or may hereafter be adjudged by the final judgment or decree of a court of competent jurisdiction to be executed by the sheriff of the county in which such real estate was originally situated, such process may be executed by the sheriff of the new

county in which such real estate is found to be situated, with the like effect as if he were the sheriff of the county designated in the judgment, decree, or order of sale, to execute the same.

Sec. 2. This act shall take effect and be in force from and after its passage. [Approved March 16, 1874; Stats. 1873-4, 365.]

An act to declare valid writs, process, and certificates issued by the superior courts of this state, or the clerks thereof, before such courts shall have been legally provided with seals.

Writs, process, etc., declared valid.

Section 1. No writ, process, or certificate issued by any superior court, or the clerk thereof, before such court shall have been legally provided with a seal, shall be invalid, if in other respects valid, by reason of the absence of a lawful seal; but every such writ, process, or certificate, whether under the seal of one of the courts abolished on the first day of January, eighteen hundred and eighty or under the private seal of the clerk, or under any other seal, or issued without a seal, shall have the same validity as if it had been authenticated by a legally adopted seal of the court out of which or by whose clerk it was issued.

Sec. 2. This act shall take effect immediately. [Approved March 31, 1880; 1880, 19 (Ban. ed., 62).]

PUBLIC ADMINISTRATOR.

The act of March 30, 1872, Stats. 1871-2, provided that if a public administrator of any county failed to qualify or to perform his duties, the coroner should be ex officio public administrator, and in case of failure to qualify or of neglect on his part, the supervisors should appoint a suitable person to act. See, ante, sec. 1726, note.

RECORDS.

An act to transfer the records, papers, and business of the courts existing on the thirty-first day of December, eighteen hundred and seventy-nine, in this state, to the courts now existing therein.

- § 1. Supreme court, successor of court of same name.
- § 2. Superior courts, successor of what courts.
- § 3. Police court of San Francisco, transfer of cases to.

Supreme court, successor of court of same name.

Section 1. The supreme court shall, for all purposes, be considered the successor of the court of the same name which was abolished on the first day of January, eighteen hundred and eighty, and to have succeeded to all its unfinished business. It shall have jurisdiction of, and shall hear and determine, or otherwise dispose of, all causes, proceedings, appeals, motions, and matters pending on said day in the court superseded by it; and also, of all appeals taken to such court before or after such day, from judgments or orders of any of the inferior courts abolished by the constitution. From and after the first day of January, eighteen hundred and eighty, the supreme court shall have the custody of all records, books, and papers of the former supreme court, and the same jurisdiction over its judgments, orders, and proceedings as if they had in the first instance been rendered, made, or commenced in the present court. All laws relating to the former court shall, as far as applicable, be considered as applying to the present court. All rules of the former court which were in force on the first day of January, eighteen hundred and eighty, and not inconsistent with the constitution, shall continue in force as rules of the present court until altered, abolished, or superseded by the order of the court.

Superior courts, successor of what courts.

Sec. 2. The superior court of each county in this state shall, for all purposes, be considered the successor of the district, county, and probate courts thereof, and, in the city and county of San Francisco, of the municipal criminal court and municipal court of appeals, and shall be deemed to have succeeded to all the unfinished business of said courts. The superior courts shall hear, determine, or

otherwise dispose of, all causes and proceedings which were pending on the first day of January, eighteen hundred and eighty, in the said courts superseded by them, and every motion or proceeding then pending or thereafter made or taken in such causes and proceedings, and of which said courts would have had jurisdiction had they not been abolished; and also, all appeals taken or perfected, before or after said day, from all orders or judgments of justices' and police courts which by law are declared to be appealable. From and after the first day of January, eighteen hundred and eighty, the superior courts shall have the custody of all the records, books, and papers of the said courts superseded by them, and shall have jurisdiction thereof, and of the judgments, orders and process of said courts; and shall enforce the same and issue process thereon in like manner, and with the same effect, as if they had in the first instance been filed, commenced, rendered, made, or issued in or by the superior court. The superior court of the city and county of San Francisco shall have jurisdiction of, and shall try and dispose of, all indictments for misdemeanor pending in the city criminal court of said city and county on the first day of January, eighteen hundred and eighty; and such indictments and all papers and records relating thereto, shall be transferred to the said superior court and become records thereof. Any application, motion, or proceeding, set by the district, county, or probate court of any county, or by the judge thereof, to be heard by such court or judge after the first day of January, eighteen hundred and eighty, may be heard in the superior court of such county, upon the same notice that was required to authorize the hearing thereof in such district, county, or probate court, or by the judge thereof. Any process issued out of any district, county, or probate court of this state before the first day of January, eighteen hundred and eighty, may be served, or the service thereof completed, after said day, in the same manner and with like effect, as if such courts had not been abolished; provided, that such process shall be returned to the superior court of the county in which it was issued, and any appearance or answer required by such process shall be made or filed in such court.

Police court of San Francisco, transfer of cases to.

Sec. 3. All prosecutions which were transferred or certified for trial to the city criminal court of the city and county of San Francisco, by the police court thereof, and were pending or undetermined on the first day of January, eighteen hundred and eighty, shall be tried and disposed of in the said police court; and all the papers, pleadings, and records relating to such prosecutions shall be transferred to, and deposited with, said police court, and become records and papers thereof.

Sec. 4. This act shall take effect immediately. [Approved February 4, 1880; 1880, 2 (Ban. ed. 2).]

STATE.

An act to authorize suits against the state, and regulating the procedure therein.*

- § 1. Right of action.
- § 2. Limitation of actions.
- § 3. Undertaking.
- § 4. Service of summons.
- § 5. Judgment.
- § 6. Duty of governor.
- § 7. Duty of controller.

Section 1. All persons who have, or shall hereafter have, claims on contract or for negligence against the state not allowed by the state board of examiners, are hereby authorized, on the terms and conditions herein contained, to bring suit thereon against the state in any of the courts of this state of competent jurisdiction, and prosecute the same to final judgment. The rules of practice in civil cases shall apply to such suits, except as herein otherwise provided.

Sec. 2. No such suit shall be maintained on any claim now existing, unless the same be brought within two years after this act takes effect; nor shall any such suit be maintained on any cause of action hereafter arising, unless the same shall be commenced within two years after such cause of action shall have accrued: provided, that the period of limitation provided for in section two of this act shall not apply to or affect the rights, interest, or

*See *Molineux v. State*, 109 Cal. 373.

claims of any minor or insane person, or a person imprisoned on a criminal charge, or in execution under a sentence of a criminal court for a period of not less than for life, or a married woman and her husband be a necessary party with her in commencing such action, or an incompetent person, but such action may be commenced within the period above provided for after such disability shall cease.

Sec. 3. At the time of filing the complaint in any such suit, the plaintiff shall file therewith an undertaking, in such sum, not less than five hundred dollars, as a judge of the court shall fix, with two sufficient sureties, to be approved by a judge of the court, and conditioned that, in case the plaintiff fails to recover judgment, he will pay all costs incurred by the state in such suit, including a reasonable counsel fee, to be fixed by the court.

Sec. 4. Service of summons in such suits shall be made on the governor and attorney-general. It shall be the duty of the attorney-general to defend all such suits; and upon his written demand, made at or before the time of answering, the place of trial of any such suit must be changed to the county of Sacramento.

Sec. 5. In case judgment be rendered for the plaintiff in any such suit, it shall be for the amount actually due from the state to the plaintiff, with legal interest thereon, from the time the obligation accrued, and without costs.

Sec. 6. It shall be the duty of the governor to report to the legislature, at each session, all judgments rendered against the state, and not theretofore reported.

Sec. 7. It shall be the duty of the controller to draw his warrant for the payment of any such judgment, without any presentation to or approval of such claim by the state board of examiners, whenever a sufficient appropriation for such payment shall have been made by the legislature; and all claims upon such judgments are hereby expressly exempted from the operation of section six hundred and seventy-two of the Political Code.

Sec. 8. This act shall take effect immediately. [Approved February 28, 1893; Stats. 1893, p. 57.]

See *Molineux v. State*, 109 Cal. 378.

An act to authorize Robert C. Ball to sue the state of California. [Approved March 24, 1891; Stats. 1891, p. 194.]

The nature of the act sufficiently appears from the title.

An act to enable the Coulterville and Yosemite Turnpike Company, a corporation, to sue the state of California for the loss and damage suffered and sustained by said corporation by the construction of a road by the Yosemite Turnpike Road Company, under and by virtue of an act of the legislature of the state of California, entitled, "An act granting the right of way to the Yosemite Turnpike Road Company over the Yosemite Grant," approved February 17, 1874, and for the relief of said Coulterville and Yosemite Turnpike Company. [Approved March 31, 1891; Stats. 1891, p. 275.]

The nature of the act sufficiently appears from its title.

An act to authorize suits against the state concerning certain real property and regulating the procedure therein. [Approved March 8, 1901; Stats. 1901, p. 111.]

This allowed the claimants of real property applied for and sold to one Estell as part of the 500,000 acre grant to sue the state to quiet title.

An act authorizing suits against the state on claims or demands arising under an act of the legislature, entitled, "An act fixing a bounty on coyote scalps," approved March 31, 1891, and regulating the procedure thereon. [Approved March 23, 1901; Stats. 1901, p. 646.]

The purpose of the act sufficiently appears from its title.

STATUTE OF LIMITATIONS.

An act respecting the limitations of actions.

Bankers' certificates of deposit.

Section 1. Where bankers' certificates of deposit have heretofore been given to any party since deceased, and not found until after administration of his or her estate, an action may be maintained thereon by the heirs or legal

representatives at any time within six months after such finding.

Sec. 2. This act shall take effect from and after its passage. [Approved March 11, 1872; 1871-2, 319.]

Superseded by section 348 of the Code of Civil Procedure.

An act supplementary to an act entitled an act defining the time for commencing civil actions, passed April twenty-second, eighteen hundred and fifty.

No limitation to action for money deposited with bankers.

Section 1. There shall be no limitation upon the right to maintain an action for the recovery of money or other property deposited with any bank, banker, trust company, or savings and loan society.

Sec. 2. All acts and parts of acts in conflict herewith, so far as the same are in conflict, are hereby repealed.

Sec. 3. This act shall take effect from and after its passage. [Approved March 16, 1872; Stats. 1871-2, 401.]

Codified and superseded by section 348 of the Code of Civil Procedure.

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